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FEDERAL COMMUNICATIONS COMMISSION

IMPROVING DISCLOSURE OF EX PARTE CONTACTS

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1 P R O C E E D I N G S

2 MR. SCHLICK: Good morning. Thank you  
3 for being here. I'd like to welcome everyone here  
4 and also those watching online to the  
5 Commission's, I believe, first staff workshop on  
6 the ex parte process. I think this is actually a  
7 terrific use for a rainy, Washington morning.

8 Before introducing those at the table  
9 with me, I want to thank Pete Belvin. To say that  
10 Pete has been instrumental in establishing this  
11 workshop would be a gross understatement. So  
12 thank you, Pete.

13 With me as moderators are Mary Beth  
14 Richards, special counsel to the Chairman for  
15 Reform, and associate general counsel and chief of  
16 our Administrative Law Division, Joel Kaufman.

17 I'm going to ask Mary Beth to start us  
18 off by putting this workshop into the context of  
19 the FCC's broader Reform Agenda.

20 MS. RICHARDS: So thank you. Good  
21 morning, everyone.

22 The Reform Agenda's goal is to make the

1 FCC a model of excellence. And the principles are  
2 data driven, transparent, timely and efficient,  
3 and effective decision- making. And this workshop  
4 today is to examine the rules and really feeds  
5 into both the timeliness and the efficiency prongs  
6 of that agenda. And I'm delighted to be a part of  
7 it.

8 MR. SCHLICK: And to give us an  
9 introduction to the work we'll try to do this  
10 morning, Joel Kaufman.

11 MR. KAUFMAN: Thank you. In adopting  
12 the current ex parte rules in 1997, the Commission  
13 sought to provide participants in FCC proceedings,  
14 as well as the broader public, with a record of  
15 the information ideas presented in Commission  
16 proceedings. The ex parte rules sought to strike  
17 an appropriate balance protecting procedural  
18 fairness and transparency on one hand, while  
19 encouraging the free exchange of information in  
20 administrative efficiency on the other.

21 Twelve years later, these objectives  
22 remain the same. However, our experience with the

1       ex parte rules suggest that it may be time to  
2       consider whether stricter enforcement and/or  
3       amendments to our ex parte rules are needed to  
4       better achieve the objectives of the rules.

5               In recent months, Commission staff has  
6       reviewed the existing rules, focusing how they  
7       work in practice, as well as in theory. As we  
8       have examined the rules, five main groups of  
9       issues have arisen.

10              The first group of issues centers on the  
11       recurring question of how to best assure the  
12       accuracy and completeness of information presented  
13       in written summaries of ex parte presentations.  
14       Specifically, how do we make certain that written  
15       summaries of oral presentations to decision makers  
16       adequately summarize the substance of the  
17       presentations and don't merely list the subjects  
18       discussed?

19              Despite our attempts to emphasize this  
20       requirement in Commission orders and public  
21       notices, as well as on our web page, the concern  
22       remains that some summaries do not adequately

1 disclose all new facts and arguments presented.  
2 To the extent this occurs, the objectives of  
3 procedural fairness and openness are shortchanged.

4           There remains the issue of how to better  
5 achieve these objectives without unduly hampering  
6 administrative efficiency. One approach might be  
7 to require that a summary be filed for every ex  
8 parte meeting whether or not new information was  
9 presented, although the summary of a meeting  
10 merely reiterating prior written filings could  
11 simply cite those filings. Others might argue for  
12 an approach in which staff would review every ex  
13 parte summary for completeness. Even then the  
14 objectives of the rules could still be frustrated  
15 by the fact that staff evaluations of the adequacy  
16 of written summaries might unavoidably vary. In  
17 addition, the staff resources demanded by this  
18 approach could also take a serious toll on the  
19 ability of the Commission to do its work  
20 expeditiously.

21           The second group of issues involves  
22 whether we should modify the list of exempt

1 presentations -- those for which the ex parte  
2 prohibitions are either relaxed or removed. For  
3 example, should the exemption that allows  
4 settlement discussions to occur be more narrowly  
5 defined to exclude certain types of proceedings  
6 such as rule making? On the other hand, should  
7 some exemptions be broadened, even if it reduces  
8 transparency to some extent as in the case of  
9 contacts between government entities working on a  
10 common problem even if they do not share  
11 jurisdiction over that problem?

12 A third group of issues involves the  
13 Sunshine Period. For example, does the exemption  
14 still serve its original purpose of giving the  
15 Commission a week of repose before a Commission  
16 meeting? Further, assuming that we conclude that  
17 the exemption continues to serve a useful purpose,  
18 should it continue to apply to both oral and  
19 written presentations, including those filed  
20 electronically? Also, should the exemptions of  
21 the Sunshine Period be recrafted to prohibit a  
22 party from fishing for an invitation to make a



1 presentation during the Sunshine Period? Or  
2 should it be amended to allow for replies to such  
3 exempt comments?

4 A fourth group of issues is whether  
5 transparency would be enhanced if we required  
6 entities appearing before the Commission to  
7 disclose who owns a significant stake in them or  
8 contributes a sizeable proportion of their budget.

9 A final set of issues has rather  
10 suddenly appeared on our radar screen in the last  
11 few months; namely, how the agency can use new  
12 media, such as blogs, to enhance access to  
13 government while still complying with the ex parte  
14 rules in the Administrative Procedure Act. These  
15 issues present a number of novel questions. For  
16 example, should blog postings be incorporated into  
17 the Commission's electronic filing system or  
18 maintained as a separate part of the record? How  
19 can we reconcile the desire not to artificially  
20 cut off blog conversations with the Commission's  
21 Sunshine Period, which generally prohibits  
22 presentations immediately before and after a

1 Commission meeting?

2           Finally, there are a host of issues  
3           pertaining to anonymous blog postings. Should  
4           they be made part of the record? If so, is the  
5           Commission required to respond to them? Blogs are  
6           the newest and potentially a very user- friendly  
7           form of public participation and information  
8           exchange. For that reason, the Commission has  
9           been taking a lead role among federal regulatory  
10          agencies in considering how to craft workable  
11          rules to incorporate new media into our  
12          decision-making process. We are testing some  
13          approaches in the open Internet NPR RAM and in the  
14          broadband NOI, but we realize that certain issues  
15          will become even more complex if we were to make  
16          blogs and other new media vehicles available in  
17          increasing numbers of proceedings. To give just  
18          one example, how can we assure that blog postings  
19          by members of the public, who may not know much  
20          about Commission dockets, be assured of finding  
21          their way into the record of the right matter?

22                I have outlined some of the issues that

1 we are considering in the context of improving our  
2 ex parte rules and practice. We will now listen  
3 to our panelists' views and suggestions.

4 MR. SCHLICK: That's a lot. It sounds  
5 like we better get going here.

6 Let me introduce our panel. Starting at  
7 my right, Chris Bjornson, who represents the  
8 Federal Communications Bar Association's Access to  
9 Government Committee. He's an attorney with  
10 Steptoe and Johnson, representing cable and  
11 satellite clients. I understand you're also  
12 recently married. So congratulations from all of  
13 us to both of you.

14 Diane Cornell is vice president of  
15 Government Affairs for Inmarsat. She's past  
16 president of the SEPA. And during her FCC career,  
17 served as counsel to three FCC commissioners.

18 Jane Mago is former FCC general counsel  
19 and the current executive vice president and  
20 general counsel of the National Association of  
21 Broadcasters.

22 Amy Mehlman is president of Mehlman

1 Capitol Strategies. That's Capitol with an "O,"  
2 not an "A," a public policy advocacy firm  
3 representing clients before Congress and the FCC.

4 Moving over to my left, John Muleta is  
5 CEO of M2Z Networks, which seeks to provide  
6 national wireless broadband service. Among his  
7 previous positions he served as chief of the FCC's  
8 Wireless Bureau.

9 Jef Pearlman is an attorney with Public  
10 Knowledge, a public policy advocacy group that  
11 promotes the public interests in access to  
12 information, especially on the Internet.

13 Andy Schwartzman is president and CEO of  
14 Media Access Project, a nonprofit public interest  
15 law firm and advocacy organization promoting the  
16 availability of diverse information and ideas in  
17 the mass media.

18 And finally, David Solomon is partner at  
19 the law firm of Wilkinson Barker Knauer. David  
20 was formerly deputy general counsel here at the  
21 FCC and the founding chief of the FCC's  
22 Enforcement Bureau.

1           On behalf of the Commission, thank you  
2           all for being here and taking the time.

3           Let me start off by asking the first  
4           question. Jane, Joel has talked about some of the  
5           purposes that the ex parte contact system here at  
6           the Commission serves. Could you give your  
7           perspective on the goals that we're trying to  
8           further through these contacts, and I suppose  
9           whether or not they succeed in doing that?

10          MS. MAGO: Okay. Let me just say up  
11          front that I really am a fan of the FCC's ex parte  
12          rules. Mary Beth, I think in your comments a  
13          minute ago you said that part of the process here  
14          is to make the FCC a model agency. And I think  
15          the FCC's ex parte rules in a lot of ways are a  
16          model for other agencies to follow. Some of the  
17          purposes I see the rules as proving is the kind of  
18          transparency that we're trying to engender  
19          throughout government by having a real record of  
20          some of the contacts that are made between  
21          individuals and government officials.

22          But also to do it in a very practical

1 way. To allow for real conversations to take  
2 place between outside parties and the government  
3 officials so that you can have the kind of give  
4 and take that leads to better government, but also  
5 gives you the kind of record that you need so that  
6 it's fair to all of the parties that come before  
7 the agency. I think that fundamental fairness  
8 element of making sure that all of those who are  
9 participating in the proceedings have the  
10 opportunity to know what, in fact, is going on and  
11 how the conversations are going is a key element  
12 of the ex parte rules.

13 I think that the rules do provide for  
14 that meaningful information. From the presenter's  
15 perspective, they allow the presenter to have an  
16 official record of what they have said to the  
17 Commission, which gives them an opportunity to  
18 have that be relied upon by the Commission. From  
19 the Commission's perspective, it gives the kind of  
20 transparency that is important to this process and  
21 also does allow them to have some reliance on the  
22 presentations that are made. And from other

1 parties' perspective, it gives them knowledge that  
2 the contacts have been made, and it gives them the  
3 ability to come in and make their own arguments.

4 MR. SCHLICK: You just reminded me of  
5 something my mother used to say to my brother and  
6 me, which is when everybody is wrong but Henry, we  
7 begin to look at Henry.

8 And the FCC is an outlier. If our  
9 system is so good -- I think I'll direct this to  
10 David. And I want to be clear that in the bounds  
11 of civility -- please jump in at any time -- but  
12 David, we are very unusual in the degree to which  
13 the Commission allows, encourages, and permits the  
14 contacts themselves.

15 But apart from the reporting issues that  
16 we'll get to in a second, do you agree that the ex  
17 parte system that we have is a good thing? And do  
18 you have any explanation for why it is that the  
19 FCC may have evolved in a different direction than  
20 other federal agencies, including other  
21 independent multi-number agencies?

22 MR. SOLOMON: Sure. I mean, first let

1 me actually congratulate you. I think as someone  
2 who worked a little on the ex parte rules, the  
3 concept that you got 10 of us to talk about the ex  
4 parte rules and an audience to listen is very  
5 impressive. So it's a good thing as part of the  
6 effort to kind of improve the Commission's  
7 processes.

8           There is a difference, and I think it's  
9 historical. And I'm not quite sure why, but I  
10 think that -- and Jane mentioned this. If you go  
11 back to the fundamental purpose of the  
12 Commission's ex parte rules, in one of them the  
13 core purpose was to make sure that things got on  
14 the record. And I think there was a history. The  
15 FCC was very much an agency that did things  
16 informally. And there are pros and cons to that  
17 approach. But I think historically it was an  
18 agency that felt comfortable having this sort of  
19 give and take and informal back and forth with  
20 people involved in the process so they could get  
21 information and sort of get it, not just in a  
22 written form, and that led to some difficulties in



1 court in the '70s in the rulemaking context where  
2 in the HBO case, the court was concerned that the  
3 FCC was deciding on the basis of things that  
4 weren't in the record.

5 So I think what the FCC tried to do --  
6 and it may have come from a different perspective  
7 than other agencies -- is sort of accommodate the  
8 fact that historically it was an agency that felt  
9 was useful to have an informal back and forth,  
10 both with the parties that it regulates and others  
11 who are interested in the area of public interest  
12 groups, et cetera, with the fact that under the  
13 APA it needed to have a record. It needed to make  
14 sure it decided things on the basis of the record.  
15 So in that sense, I think as the rules have  
16 evolved over the last 30 years since those court  
17 decisions, the FCC really has done a good job in  
18 improving its posture and making sure that things  
19 are by and large in the record and certainly  
20 things that it's relying on its decisions are in  
21 the record. I'm sure there's always room for  
22 improvement, and it's a good thing to be thinking

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1       about that, but I think fundamentally it has  
2       achieved what the FCC set out to do, which is to  
3       ensure that there's fairness and that there's a  
4       record for its decisions that includes what people  
5       have said to it.

6               MR. SCHLICK: Is there anyone at the  
7       table who would like to take the contrary view  
8       that we should be operating more like a court?  
9       That we should be more focused on paper pleadings,  
10      limiting the substantive comments to a comment  
11      cycle, and discouraging the sort of ex parte  
12      contacts on which the Commission has come to rely?

13             MR. MULETA: I think the problem with  
14      that approach is that it sort of disregards sort  
15      of the political nature of what goes on inside the  
16      Commission in terms of the commissioners making  
17      the decisions. I think part of the problem is  
18      that, you know, you essentially have the staff  
19      works on things for a long period of time and then  
20      in sort of a very narrow window of time. Usually,  
21      especially on agenda items, other commissioners  
22      sort of have to weigh in and what part of the ex

1       parte contacts are designed to do is to allow  
2       people to sort of independently verify the record,  
3       independently verify positions that people might  
4       have taken into the item that's been drafted. So  
5       I don't think you can completely go to a  
6       court-style solution.

7               I do think what we have to do is --  
8       actually, for the Commission to be very clear  
9       about -- that it's getting ready to make a  
10      decision so people become aware and sort of spend  
11      their time and effort trying to clarify the  
12      record. You know, when you don't know things are  
13      happening on the outside, you're sort of, you  
14      know, all you see is, you know, to the extent that  
15      you can monitor -- and this kind of goes to the  
16      blog postings and the new media -- you're not  
17      aware of the sort of significance of these ex  
18      parte contacts and what issues are sort of being  
19      narrowed, or expanded, or being resolved.

20             So I think what would really help in  
21      this process is to have a very clear delineation  
22      that the Commission is getting ready to make a

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1 decision about a particular issue, which allows  
2 then people to come in and make their relevant  
3 statements.

4 MR. SCHLICK: Let me hand it to you.

5 MR. SCHWARTZMAN: Yeah. When we're  
6 talking about general purposes, I do want to  
7 observe one important element of the ex parte  
8 rules that I think has been overlooked a little  
9 bit in planning this.

10 We all view this -- and we were joking  
11 about it beforehand -- it's very much an insider's  
12 kind of process and very wonkish in nature. But,  
13 in fact, the transparency function of the ex parte  
14 rule affects lots of people. And in particular,  
15 it affects the press. And I would think that, you  
16 know, working press should be considered to be an  
17 important player in this process, and they serve  
18 as proxies for the public as a whole. And I would  
19 note that some issue has been raised about only  
20 interested parties should have standing to file  
21 complaints about violation of the ex parte rules.  
22 And I think that that's way off. I think that

1     anybody should have that right, including the  
2     working press.  These are -- ex parte  
3     communications are certainly -- could be obtained  
4     under the Freedom of Information Act.  It's  
  
5     illogical that something that's not exempt from  
6     the Freedom of Information Act, which gives  
7     standing to anybody, should limit standing.  So I  
8     want to focus on the purpose of transparency  
9     generally, rather than just affecting interested  
10    parties.

11            MR. SCHLICK:  You anticipated the  
12    question I was going to ask John, and maybe you've  
13    given the answer.  But no one at this table thinks  
14    that there is a problem with the general system  
15    and that we should go to more paper-based system.  
16    But those who are not at this table, who are not  
17    represented at this table and those -- that is  
18    those who aren't generally familiar with the FCC's  
19    process and aren't frequent players here, aren't  
20    sophisticated in the ways of the Commission -- I  
21    would think it could be argued that for those  
22    persons the ex parte system is less transparent

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1       than a more court-like paper record.

2               Is that a problem? Or is the problem  
3       that if we have a healthy system of disclosure  
4       then the press and those who generally represent  
5       the interests of those groups will have access and  
6       will be able to convey the information.

7               MR. MULETA: I think, you know, if you  
8       look at -- if you're a California-based  
9       entrepreneurial company with no Washington  
10      presence, I think the issue is you might read  
11      about it and find out from the press that activity  
12      is heating up. But then there goes the next step  
13      of how do I present my information in a way that's  
14      sort of decisionally relevant. Right? You know,  
15      so you can have people making blog postings. They  
16      could be sending e-mail. But the issue is how is  
17      the staff or the decision maker interpreting this  
18      input and making it relevant for the record? You  
19      know, how are they, you know, if somebody is a  
20      Nobel Prize winner and sort of writes an economic  
21      treatise on a particular FCC decision, but sends  
22      it as an e-mail, does it count?

1           So these are the kind of challenges I  
2     think that you have even under whatever system you  
3     go through. I think what we need is some clarity  
4     about when is input relevant? How is the input  
5     interpreted? And how widely disseminated is the  
6     timeline?

7           MS. RICHARDS: So, I'll take over with  
8     my questions.

9           It seems that we have some consensus  
10    that the rules are good. But let's assume for a  
11    moment that they can be improved. And we've heard  
12    a little bit this, but if we can just go around  
13    the table -- David, we'll start with you since you  
14    were the last in the introduction -- and let me  
15    know in a minute or less kind of the biggest  
16    problem and your solution for that problem,  
17    please.

18          MR. SOLOMON: I think the Commission  
19    ought to think about changing in a serious way the  
20    Sunshine Prohibition. The original purpose of the  
21    Sunshine Prohibition was to give the Commission a  
22    period of repose. And the concept was that in the

1 last week before a meeting it didn't want to be  
2 bombarded with information and it could --  
3 basically, the commissioners could sit in their  
4 office with kind of no outside influences  
5 affecting them. And I think as a practical matter  
6 there have been so many chips in that process that  
7 I think we end up getting more confused by what  
8 the exceptions are and who gets in and who doesn't  
9 and how, in the sense that right from the start  
10 Congress actually passed a statute saying -- well,  
11 Congress, of course, has to be exempt from the  
12 Sunshine Prohibition. So, commissioners can get  
13 letters from members of Congress and calls from  
14 members of Congress.

15 There's been more increase in use of the  
16 media, so there are ads in Comm Daily during the  
17 Sunshine Period. There are open letters to the  
18 chairman that get into the media. So as a  
19 practical matter, the commissioners aren't  
20 deciding things in isolation. And given that  
21 that's the case, I wonder if it's just better to  
22 sort of have anyone can contact the Commission.

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1 And there's always some unfairness in the sense  
2 that somebody's last, but that's true with the  
3 Sunshine cutoff, too -- that somebody's last. So  
4 that's something for the Commission to consider, I  
5 think.

6 MS. RICHARDS: So repeal the --

7 MR. SOLOMON: Repeal the prohibition and  
8 basically, at least to some extent, just admit  
9 that the commissioners are getting information and  
10 then facilitate everybody getting information to  
11 them so it's basically equal.

12 MS. RICHARDS: Andy?

13 MR. SCHWARTZMAN: Well, first, I concur  
14 in part with what David said, not necessarily the  
15 result. I think that the Sunshine process needs  
16 to be fixed and is one of the bigger problems.  
17 But to my mind, by far the biggest problem is the  
18 inadequacy of disclosure under the current system,  
19 which Joe referred to in his opening remarks.  
20 Groups like mine are very dependent on having an  
21 idea about exactly what kinds of issues are  
22 presented. So this could be fixed by clarifying

1 yet again that more than a one or two sentence  
2 summary is necessary for notices of oral ex parte  
3 communications and more identification of the  
4 process.

5 A major loophole is the consistent with  
6 prior pleadings thing. Well, if your comments say  
  
7 that you'd like no less than 30 percent of  
8 whatever to be the rule that's adopted, you go in  
9 and then argue to a commissioner that 60 percent  
10 is the right goal, that's consistent with no less  
11 than 30. And that's a big problem.

12 One element of my solution would be  
13 something else Joe referred to -- making the staff  
14 part of the process. Staff is supposed to get a  
15 copy of ex parte communication. I think staff  
16 should be tasked with flagging notices that are  
17 inadequate.

18 MS. RICHARDS: So that would be the  
19 person to whom the presentation is made?

20 MR. SCHWARTZMAN: That's correct.

21 MS. RICHARDS: Because sometimes the  
22 staff, you know, the bureau staff are not present

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1 in the meetings.

2 MR. SCHWARTZMAN: Well, that's right.  
3 That's part of the solution, I think, that ex  
4 parte notices should be reviewed in addition  
5 elsewhere in the Commission. And ones that are  
6 transparently inadequate should be flagged both by  
7 some sort of review process, as well as by the  
8 parties to the meeting. I think that this will  
9 not become excessively burdensome because people  
10 will start complying. The problem right now is  
11 there are loads and loads and loads of incomplete  
12 ex parte notices.

13 MR. PEARLMAN: So --

14 MS. RICHARDS: Jef?

15 MR. SCHWARTZMAN: May I make one very  
16 small note? I object on principle to the use of  
17 the term ex parte as a noun, as in I filed an ex  
18 parte. It offends my eighth grade grammar  
19 teacher.

20 MR. PEARLMAN: So I'd actually go even a  
21 little further than Andy, except for that last  
22 part, which I really don't have an opinion on.



1 MS. RICHARDS: We'll add that to the  
2 rules.

3 MR. PEARLMAN: Andy mentioned that there  
4 are a lot of ex parte filings, which are  
5 transparently inadequate. But I think the real  
6 problem is the filings which are nontransparently  
7 inadequate that omit information that is  
8 important, especially important to other parties  
9 in the proceeding, but where it's not clear. The  
10 60 percent example is a good one. If someone left  
11 that out I would have no way to know as a third  
12 party that that was said in the meeting and that  
13 it was left out.

14 So, I think, as you said, Commission  
15 involvement in this process is key. I would even  
16 push that a little farther if possibly only for  
17 the sake of discussion and say that perhaps like a  
18 lot of other agencies, the Commission should  
19 actually write ex partes. And, you know, the ex  
20 parte rules as they stand show a recognition that  
21 there's an incentive here for parties to omit  
22 things, to delay things, that it gives them an

1        advantage to be able to present things to the  
2        Commission, but not actually state that to the  
3        public.

4                    And so if you really want to create  
5        incentives to disclose these things fully to the  
6        public you could do something like have the party  
7        file an ex parte and have some Commission staff  
8        file an ex parte, some description, without seeing  
9        the other party's so that there's an incentive  
10       there not to leave things out because it will  
11       become painfully obvious when Commission staff  
12       says something that you did not list that same  
13       thing in your own filing.

14                   So that would be one way. There are a  
15       lot of other small things you could do. You could  
16       include the date of the meeting in the metadata  
17       that's, you know, listed at the Commission when  
18       you file a Notice of Ex Parte, which would make it  
19       very clear immediately if and how late you were in  
20       your filing and if you are a repeat offender. But  
21       I think the key thing is that none of these  
22       incentives are going to be worthwhile unless there

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1 is enforcement. Unless there is some penalty or  
2 some reason not to violate the rules beyond a  
3 private admonition from the Commission -- please  
4 don't do that anymore. So, and you know, this may  
5 just be a cultural thing. It may just be that  
6 someone at the Commission needs to commit to  
  
7 enforcing these rules in a stronger way than it's  
8 been done until now regardless of who that is at  
9 the Commission.

10 And I just want to flag one other issue  
11 for later discussion. There is a flipside of  
12 this, which is that certain things are allowed to  
13 be submitted to the Commission on the record, but  
14 without public disclosure. You know, proprietary  
15 information. The Commission has a setup for that.  
16 But there's another side to that coin which is  
17 that some organizations are unwilling to talk to  
18 the Commission because of the belief, usually  
19 correct, that they need to disclose it to the  
20 public and the fear of reprisal from other parties  
21 -- private reprisal. And so I think there needs  
22 to be some discussion of how to address that issue

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1 as well.

2 MR. MULETA: I think in terms of the  
3 Sunshine, I think it has to be an all or nothing  
4 of application. You know, making exceptions in  
5 the Sunshine Period, I think, is problematic. But  
6 I think I agree with Jef and Andy that -- with  
7 sort of one sort of narrowing of the issue. I  
8 think within a certain period of time is when I  
9 would start applying that the Commission staff  
10 needs to -- providing summary. I think what that  
11 would do is it sort of signals as to what issues  
12 are actually being discussed and being relevant.

13 So if you take what Andy and Jef have  
14 said, which is the staff would then be saying,  
15 hey, we had a meeting, we talked about 30 percent.  
16 Somebody follows and says it's about 60 percent.  
17 Then I think, you know, A, it will make the other  
18 party, the presenter, more honest. I think it  
19 would also signal to other folks these are the  
20 issues that are being debated. And so the real  
21 hard time is when do you start applying that?

22 I can tell you that in a multiyear

1 process, you know, 80, 90 percent of the filings  
2 are essentially repetitious. It's like, you know,  
3 we said this before. We met again with three more  
4 people and we said the same thing. But then it  
5 gets down into this sort of frenzy of last minute  
6 discussions. And in that point, that's when you  
7 need to have a high level of veracity; you need to  
8 have a high level of accuracy about the  
9 statements; and I think the staff -- I don't think  
10 it would be unduly burdensome on the staff at that  
11 point to sort of reflect this is what we heard.  
12 These are the questions we asked and these are the  
13 answers we got. So I think if we can decide on  
14 what time is relevant, I agree with what Jef and  
15 Andy are saying in terms of getting the staff  
16 involved to put a check on the outside parties.

17 MS. RICHARDS: Amy?

18 MS. MEHLMAN: Well, I think generally  
19 the ex parte rules actually work. I think that  
20 the honor code is generally utilized very well by  
21 most of the community. And I think there could be  
22 some tweaking -- memorandum that could be put out

1       that could clarify a little bit more about what  
2       should be in the ex parte presentation or filing,  
3       such as, you know, give literal examples as to  
4       what needs to be in there. I talked about X  
5       filing or I reiterated X point as stated in X  
6       filing and really get down a little bit more into  
7       the nitty-gritty.

8               As to the Sunshine Period, I tend to  
9       agree with the all or nothing approach, as well,  
10      mostly from a level playing field perspective. If  
11      I get called, great for me. But for the person  
12      that's on the other end of the argument and they  
13      don't get called, you know, it's a very difficult  
14      situation to be in. And I've been in that  
15      situation, too.

16             So, I mean, I think we really need to  
17      think about how we make it manageable for the  
18      staff because there is a time that they need to,  
19      you know, reflect and actually not have meeting,  
20      after meeting, after meeting and actually study  
21      these issues and get to where they need to be as  
22      far as a decision. But, you know, we also need to



1     make it fair for everybody. And I would include  
2     actually for Andy and Jef, you know, fairness from  
3     the standpoint of John Q. Public, who is out there  
4     and doesn't necessarily have, you know, a  
5     Washington presence, the access that a lot of us  
6     sitting around this room do to talk to these  
7     people, so I think we need to sort of, you know,  
8     this is what this forum is all about. Discuss  
9     these issues and figure out how to amend and make  
10    it better. But generally I think everybody abides  
11    by them well.

12           The other thing that I would mention --  
13    I think we're going to get into this later, but --  
14    is the new media. How do you deal with it? How  
15    do you not only deal with the new media as far as  
16    e-mails, blogs, but calls to the FCC? I mean, you  
17    know, people -- I'm sure the FCC has been getting  
18    calls for a very, very long time on issues. How  
19    do you record those? Are they different than  
20    e-mails? And again, those will be issues that we  
21    need to discuss and figure out how they become  
22    part of the record or not. But I wanted to bring

1       that up as another piece of the, you know,  
2       potential level playing field that we need to  
3       discuss.

4               MS. RICHARDS: Jane, what problems do  
5       you see and solutions?

6               MS. MAGO: At this point I've got a  
7       whole bunch of extra comments to make, but I'll  
8       start with the -- the problem that I had thought  
9       about trying to identify is one that's a little  
10      bit related to some of the things that have been  
11      said of timeliness. I think that there are times  
12      within the process here where parties have taken  
13      advantage of sort of a time gap at the point where  
14      the Commission is about to make a decision, and  
15      sometimes when they're at the very edge of making  
16      a decision, there is an ex parte presentation of  
17      some sort on which the Commission relies that  
18      doesn't make its way into the record of the  
19      proceeding until after the Commission has actually  
20      reached its decision. And I think that is a very  
21      real problem, particularly in the context -- I  
22      think this happens more in, you know, a permit but

1 disclose, but I've seen it in rulemaking as well;  
2 that there's something that comes in at the last  
3 minute that you don't see the ex parte for a  
4 period. I think the solution to that might well  
5 be that if you have something that the Commission  
6 is going to rely upon that there is a requirement  
7 that it be placed in the record within, you know,  
8 an hour. Don't stay with the lengthier period of  
9 time, but have something that it must be in the  
10 record of the proceeding. I think that's  
11 something that could be very helpful.

12           Going back to some of the earlier  
13 comments and staying, Austin, within your bounds  
14 of civility requirements, I would make a note to  
15 Andy's point that it's not just groups like Andy's  
16 that rely on the ex partes, but I think it's  
17 everybody. This goes across the board. This is  
18 not something that, you know, is public interest  
19 groups versus industry side, but rather is  
20 something that anybody who has an interest in the  
21 Commission's proceeding I think has an interest in  
22 the ex parte rules.

1                   With regard to the Sunshine Period --

2                   MS. RICHARDS: And DI think his point  
3                   was that there's a limitation on interested  
4                   parties and that that should be broadened so that  
5                   not only interested parties should be able to take  
6                   advantage of the enforcement piece of it.

7                   MS. MAGO: And I think if you go to the  
8                   enforcement piece -- I do want to emphasize one  
9                   piece on that, as well, which is that I don't  
10                  think enforcement should become a sideshow. I  
11                  think David Solomon and I have had this discussion  
12                  a couple of times. You can get distracted from  
13                  the real substance of the proceeding if you make  
14                  too much out of the ex parte. The whole point is  
15                  that you need to have enough information. And if  
16                  the Commission is encouraging parties on a regular  
17                  basis to let those -- get, you know, a fulsome ex  
18                  parte in, it may be that a one or two sentence ex  
19                  parte is sufficient. That's not, you know, it's  
20                  not immediate evidence that there is a problem.  
21                  It may be that you've given a full presentation,  
22                  your written presentation, and you pretty much

1       stayed with it.

2               Now, if you're straying from it, and if  
3       the Commission is relying upon that, then I think  
4       that it's incumbent to make sure that that is, in  
5       fact, in the record so that people can discuss it.

6               I was going to go to the Sunshine Period  
7       for a second in terms of the exemptions that  
8       happen within the Sunshine Period, which I think  
9       can be a difficult time. A suggestion that I  
10      would have in dealing with that, if you're going  
11      to retain the Sunshine Period to give the  
12      Commission a period of repose, and having been on  
13      the eighth floor, I understand the purpose of  
14      having some sort of a period of repose at times.  
15      I would say that there has to be a staff generated  
16      ex parte -- a notice for any ex parte that occurs  
17      during that period. Thus, if someone contacts  
18      someone on the outside, then the staff has got to  
19      make a point in the record that, in fact, that  
20      contact took place and some summary of what it was  
21      that, in fact, happened in there. It would have  
22      the effect of, you know, making sure that the

1 record was complete. But potentially, if there's  
2 some abuses that might come along, it might also  
3 be a disincentive to having, you know, those  
4 outside contacts if they're really not appropriate  
5 in the context of Sunshine.

6 MR. SCHWARTZMAN: Can I add one very  
7 small thing? It is a big problem at the end of a  
8 proceeding that it is possible to file paper ex  
9 parte notices which don't get scanned and put into  
10 the record until it's too late to decide things.  
11 And that's an easy fix. Anybody who has the  
12 wherewithal to be able to make an ex parte  
13 presentation at that late stage of the game has  
14 the wherewithal to file electronically.

15 MS. RICHARDS: Okay, let's keep --

16 SPEAKER: We can come back to Sunshine.

17 MS. RICHARDS: And we're going to have a  
18 whole time on Sunshine. So let's keep going.

19 MS. CORNELL: I actually agree with  
20 Andy's last point, and that's a good segue to the  
21 issue -- the greatest issue I have, which picks up  
22 on a lot of comments that people have been making.

1       That is sort of the reliance on sort of last  
2       minute flurry of ex partes as part of the process.  
3       I think it's very important that ex partes take  
4       place and take place throughout the process  
5       because we all work in industries where technology  
6       changes and things are different than at the  
7       beginning of the proceeding. And I think, you  
8       know, that's an important point for folks to be  
9       able to bring to everyone's attention.

10               But I do think that there can be sort of  
11       a back and forth immediately before Sunshine. Or  
12       at the end of the proceeding if it's not subject  
13       to Sunshine that can be challenging for smaller  
14       companies that don't have the legions of lawyers  
15       that larger companies do to follow. And  
16       expensive, even for larger companies. And to me  
17       the greatest problem of all is that the FCC staff  
18       may not have time to analyze what's actually been  
19       said.

20               So I would actually have a different  
21       solution than some of the other folks. I think  
22       that we ought to sort of clamp down on Sunshine.

1 I think a period of repose when FCC staff can  
2 actually read what was submitted and think about  
3 the issues before a decision is made in Sunshine  
4 context is very important. So I would have a  
5 stricter deadline at the beginning of Sunshine  
6 instead of actually at the time of vote. If  
7 you're going to go that approach and give people a  
8 real period of repose -- or of reflection perhaps  
9 is a better way of putting it -- to think about  
10 the issues and think about what's been said.

11 I also think that the FCC staff -- I  
12 would also put a role on the FCC staff --  
13 responsibility on the FCC staff -- to as a  
14 practical matter, you know, on the disclosure  
15 piece I would not have them -- I think it's  
16 unrealistic, frankly, to have them actually file  
17 anything in the record. But I think it's entirely  
18 appropriate for them to go back to the parties and  
19 say, you know, your ex parte was not adequate. It  
20 did not disclose what needed to be disclosed. Or  
21 if it's filed after a particular time period, just  
22 tell people it's not going to be considered, you



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1 know, if it's a written submission, for example,  
2 during Sunshine.

3 MS. RICHARDS: Chris?

4 MR. BJORNSON: A couple quick things  
5 before I get going with what I think is a problem  
6 we should address.

7 First, as Austin indicated, I'm one of  
8 the co- chairs of the FCBA's Access to Government  
9 Committee. And along with my fellow co-chairs,  
10 Pete Corea, Michelle Cohen, and Howard Weiss,  
11 we've consulted with other practitioners and  
12 thought about these issues a great deal.

13 That being said, due to the FCBA's  
14 diverse membership, I'm not authorized to give the  
15 official views of the FCBA and my comments here  
16 today are a reflection of the observations that  
17 the Access to Government Committee has seen over  
18 its time in deliberation.

19 Second, having given my disclaimer, let  
20 me appear to immediately contradict it by saying  
21 that the FCBA shares the FCC's commitment to  
22 openness and transparency. And like we did in

1       1995 and the last time the FCC revised its ex  
2       parte rules, we stand ready to facilitate the  
3       Commission's review of the ex parte rules by  
4       offering to organize a seminar or an event for our  
5       members to express their views on the ex parte  
6       rules and to share their experiences with the  
7       operation of the rules.

8               Additionally, the Access to Government  
9       Committee, through a discreet e-mail address,  
10      plans to canvass the views of the FCBA membership  
11      and pass those along to the Commission in an  
12      appropriate manner.

13             And finally, if the Commission initiates  
14      a formal docket and some sort of comment cycle,  
15      the FCBA plans to notify its members and encourage  
16      them to provide formal and informal comments to  
17      the Commission.

18             Now, shifting over to what I think the  
19      -- what problem I would point out -- I think I'd  
20      like to cheat a little bit with my answer because  
21      the FCC made great strides in addressing it last  
22      week. And it's different from what's been brought

1 up so far.

2 As Joel noted, the current ex parte  
3 rules were adopted in 1997 before the FCC shifted  
4 from paper filings to heavy and in many places a  
5 mandatory reliance on electronic filings. As part  
6 of this paradigm shift, the FCC implemented ECFS  
7 in 1998, after the ex parte rules were adopted.  
8 The initial version of ECF was a fine filing  
9 system of comments and reply comments, but it  
10 wasn't really more than that. Then last Friday, a  
11 FCC team led by Bill Klein unveiled the ECFS 2.0.  
12 And I think it's fair to say it revolutionizes the  
13 filing and retrieval of comments and how users can  
14 manipulate those comments and the database for  
15 their purposes.

16 Some of the features include the ability  
17 to file multiple documents and multiple  
18 rulemakings, advanced search and queries of both  
19 filings and rulemakings, the ability to extract  
20 comments, really simple syndication feeds, and the  
21 ability to export data results to Excel or PDF  
22 formats. It's really nothing less than amazing,

1       and I encourage everybody to take a look and learn  
2       how to use ECFS 2.0. It is a huge upgrade and I  
3       can't commend it enough. And it shows that  
4       technology can perhaps be a solution to many of  
5       the issues with the ex parte process.

6               My unabashed praise for the system  
7       upgrade also suggests how we should go about  
8       reforming ex parte rules. We should take into  
9       account ECFS and the electronic methods. Two  
10      examples come to my mind off the top of my head.  
11      And like Andy suggested and a couple of folks have  
12      already agreed with him, but perhaps even more so,  
13      there should be mandatory electronic filing of  
14      oral ex partes. And second, in terms of service,  
15      any electronic filing should be presumed served  
16      once it's posted on the system. That would be  
17      great efficiency to many folks and would cause  
18      more people to rely on the ECFS. The greater  
19      reliance we can give the ECFS will improve the  
20      process, will improve speed of access, and I think  
21      it should be used to its fullest.

22               MS. RICHARDS: Thank you.

1                   MR. MULETA: Can we discuss some  
2 heartburn issues?

3                   MR. SCHLICK: What we're going to do now  
4 is move to an agenda. The substantive issues I  
5 think touched just about everything that we've got  
6 here, but then at the end -- we'll try to move  
7 quickly enough to give you a chance. If you still  
8 have heartburn you can let us share it.

9                   Chris, thank you for the plug of ECFS  
10 2.0. I think it is terrific and those who haven't  
11 visited our website should take a look at it. I  
12 think we even posted -- a tutorial is posted, I  
13 think. There's a link to a tutorial.

14                  MR. BJORNSON: I think the tutorial is  
15 posted and I think I've suggested -- I haven't  
16 been able to find any faults with it, but my  
17 understanding is if you find issues with ECFS 2.0,  
18 it can be easily upgradable and those -- any  
19 issues or any suggestions should be forwarded to  
20 the folks who run ECFS. Bill Klein, in  
21 particular.

22                  MR. SCHLICK: 2.1 is on the way, I

1       guess. I wasn't sure that we would have an  
2       audience today, and we do. And I appreciate that.  
3       But as an aside, if anyone in the audience has  
4       questions, just in your best penmanship you can  
5       feel free to write them down. And Pete, would you  
6       mind raising your hand? Hand them to Pete, who  
7       will get them to us. And at the end we'll try to  
8       make time to ask some of them if they haven't  
9       already been addressed.

10               I'm now going to turn it over to Joel to  
11       start touching on some of the problems that the  
12       panel has identified.

13               MR. KAUFMAN: One of the issues that  
14       we've discussed most so far goes to the level of  
15       detail in the ex parte summaries. And one  
16       question that we've been thinking about is whether  
17       those types of concerns can be addressed by  
18       modifying the rules or whether they can best be  
19       addressed by a stronger enforcement mechanism.  
20       And certainly, in the context of enforcement, one  
21       question that comes up is since a summary by  
22       definition is not going to have every single

1 detail except in extreme egregious cases, is an  
2 enforcement mechanism the best way to get at the  
3 problem? And I guess I'd ask David first given  
4 that you've spent a lot of time dealing with  
5 enforcement issues here at the Commission in the  
6 past.

7 MR. SOLOMON: I guess I'm sort of  
8 worried about starting a cottage industry,  
9 although maybe I'd benefit from it, but starting  
10 from a cottage industry of kind of enforcement  
11 practice on the ex parte rules. And I guess what  
12 I think would work better is -- and maybe it needs  
13 to be modified some, I'm not sure -- but sort of  
14 what traditionally was kind of an informal process  
15 that pretty much worked, I think, which is to the  
16 extent that someone was concerned that a summary  
17 was sort of grossly inadequate -- and I know we  
18 used to get these in the General Counsel's Office  
19 and it wasn't necessarily parties -- press could  
20 do it, anyone could do it -- would simply write a  
21 letter and say so-and-so filed these comments. I  
22 think -- and they might categorize it as a



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1 complaint or letter, but I'm complaining that  
2 so-and-so's comments violated the ex parte rules  
3 because the summary wasn't enough. And typically  
4 the General Counsel's Office would send that  
5 complaint or letter to the person who filed the ex  
6 parte summary and say we received this complaint;  
7 please comment. And typically what happened from  
8 the party who received it is they said we think  
9 our summary was sufficient; nevertheless, here's a  
10 more detailed summary. And that was kind of the  
11 end of it. And it seems to me that sort of works.  
12 And, you know, to the extent that there's some  
13 egregious thing where you discover that one  
14 entity, 50 people are filing complaints every year  
15 saying every single summary they file is  
16 inadequate and they simply fix it after the fact,  
17 maybe they need to be spoken to or dealt with.

18 But it seems to me that I would want to  
19 avoid -- and I know this happens more in  
20 restricted proceedings where the ex parte rules  
21 are more significant, but you get this sort of  
22 sidebar where everybody's sort of screaming at

1       each other in pleadings about outrageous  
2       violations of the rules and what it means for  
3       their character qualifications and all of that.  
4       And sometimes that's warranted in the restricted  
5       side of things, but in the permit but disclose, it  
6       just seems to me that the focus should be on if  
7       there aren't adequate summaries, helping get  
8       adequate summaries in and not having sort of a  
9       side practice of complaints about people.

10               MR. MULETA: I think the issue here is,  
11       is a statement made relevant? If it's an  
12       irrelevant statement and nobody relies on it, who  
13       cares, right, at the end of the day? So the issue  
14       here is who's identifying -- so if the Commission  
15       takes a statement from Jef; Jef has an inadequate  
16       disclosure; the Commission then relies on it; puts  
17       out an order. You know, a party, like myself,  
18       would say, wait a second. You can't rely on the  
19       statements that he made in which I had no chance  
20       to respond. I think the issue here is somebody's  
21       got to make the determination based on the  
22       reliance of the information. So, I think the

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1 enforcement mechanism, you know, it sort of  
2 already works. But the problem is who's the  
3 person identifying? In restricted proceedings,  
4 because you have narrowed who can participate,  
5 what you have is sort of this self-policing  
6 mechanism. In permit and disclose, you know,  
7 anybody could come in and then somebody in the  
8 Commission relies on it to take a position. And  
9 it's sort of after the fact and it becomes too  
10 late, I think. That's the challenge that I see.

11 MR. KAUFMAN: Does anyone want to take a  
12 position in favor of stronger enforcement?

13 MR. PEARLMAN: I would be happy to take  
14 that position.

15 I don't think enforcement needs to be  
16 incredibly strong, and I don't -- also don't want  
17 to create this cottage industry of, you know, ex  
18 parte violation enforcement proceedings. But, you  
19 know, as you said, the Commission can just say  
20 stop. But I remember a Robin Williams bit about  
21 how, you know, in Britain the police don't have a  
22 gun and you don't have a gun. So all they can say

1 is stop. Or I'll say stop or again.

2 When you're in that sort of situation  
3 without the actual stick behind it, there's no  
4 reason to actually stop. You know, there are  
5 plenty -- I don't know about plenty -- there are  
6 organizations who do consistently file late  
7 filings, incomplete filings. And occasionally  
8 they are -- there are letters sent and  
9 occasionally they're admonished not to do it and  
10 they do submit a replacement filing. But as long  
11 as there's no real incentive to stop doing this in  
12 the long run, I think it will continue. So I  
13 think there does need to be some sort of stronger  
14 enforcement. And I don't know what the sanction  
15 is, whether it's a bar on oral ex parte  
16 presentations temporarily or some other sanction.  
17 And hopefully, it won't be used very often, if  
18 ever, but the presence of a credible threat is  
19 necessary to actually changing people's behavior.

20 And to that end, I think, you know, the  
21 Commission will always have either explicit or  
22 implicit discretion on how it applies these

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1 things. So, you know, if someone files an ex  
2 parte one day late and someone else comes in and  
3 says you need to bar them from presentations for a  
4 year, you know, the Commission will say that's  
5 ridiculous; we don't need to do that. But at the  
6 same time, if someone is repeatedly and  
  
7 egregiously violating the rules there needs to be  
8 some sort of actual punishment available.

9 MS. MAGO: I think that the real point  
10 though in terms of that is that the Commission has  
11 not just got the ability to just say stop. I  
12 mean, the Commission has the ultimate power here  
13 that it's not going to rely on whatever was  
14 presented in the ex parte communication. And, in  
15 fact, it's in the Commission's interest to do that  
16 because if the Commission, in fact, does rely --  
17 and this is to John's point -- if the Commission  
18 does rely on something that is not a part of the  
19 record of the proceeding, the ultimate sanction is  
20 in the courts through administrative procedure.  
21 And the Commission has had those through the  
22 years. I mean, the various cases that have been



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1       returned over time because the Commission is, in  
2       fact, relying upon something that's not in the  
3       record. That's the Commission's interest -- is in  
4       making sure that that happens.

5               Now, having said that, I agree that  
  
6       there still should be encouragement to have  
7       fulsome, you know, ex parte notices in the record  
8       because I do think that it helps to inform the  
9       debate. Whether or not it's specific reliance,  
10      there should be a fulsome discussion so that that  
11      can take place so the Commission can make better  
12      decisions.

13             SPEAKER: And I would -- just to pick up  
  
14      -- I'm sorry, Jef.

15             MR. PEARLMAN: I'll address one part of  
16      that real quickly. And I agree with what you said  
17      except -- both Jane and Joel -- to the extent that  
18      we're worried about reliance on these things that  
19      weren't fully disclosed part of the problem is  
20      it's easy and common to rely on something without  
21      relying on it explicitly. If it changes your  
22      mind, but the record is complete enough that you

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1     have other justifications for the decision, then  
2     that, you know, it's a problem that will never  
3     fully be solved, but it's a problem that we should  
4     try to solve as best we can.

5             MS. CORNELL: I think one way to do this  
6     is to make it -- first of all, I would have ex  
7     partes filed for every meeting so that you don't  
8     run into the problem of meetings happening without  
9     -- inappropriate proceedings -- where you don't  
10    have the problem with meetings happening without  
11    having any kind of ex parte filing be a record of  
12    it.

13            But I also think it's very -- one sort  
14    of simple and effective enforcement mechanism is  
15    to have one staff member who attends the meeting  
16    to simply be responsible for eyeballing the filing  
17    and making a determination whether they think it's  
18    adequate. And particularly, if they think that  
19    there's something there -- something that was  
20    discussed that's not in there that might be  
21    relevant to the decision-making process, and then  
22    they call up the party and say, you know, look,

1 I'm sorry. This wasn't adequate. And they're  
2 responsible for redoing it instead of putting the  
3 onus on the FCC staff. I think that, you know,  
4 you have a couple of months of this and people  
5 will clean up their act. And I think that that's  
6 an effective enforcement mechanism.

7 And the ultimate one, as Jane said, is  
8 that, you know, if it's not in the record it can't  
9 be relied upon. So I think that's a practical way  
10 of moving forward on it. And I think, you know,  
11 it would change the practice, which doesn't affect  
12 the underlying legal framework, but it would  
13 change the practice relatively quickly.

14 MS. RICHARDS: Diane, having worked for  
15 three commissioners, do you think that the  
16 commissioners would want a staff person sitting in  
17 on every meeting that he or she holds?

18 MS. CORNELL: Then I think, well, I  
19 think that they typically do. They don't  
20 necessarily always, but I think at that point it's  
21 the commissioner's obligation to take a look  
22 themselves. I just think that that's a more

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1 practical solution than requiring the commissioner  
2 to file something, which is clearly not going to  
3 happen. And I think that that's -- if the  
4 Commission -- if the commissioner found a  
5 particular fact that's of interest to them and  
6 made an impact on their thinking, then, yes, I  
7 would think they would want it revealed in the  
8 record what, you know, what was articulated during  
9 the meeting.

10 MR. MULETA: I think -- I just quickly  
11 want to present a sort of factual situation so  
12 that we understand the context, I think, of what  
13 we're all circling around.

14 When you have sort of the last minute  
15 flurry of decision-making -- and I also want to  
16 point out that we're talking not just about agenda  
17 items, but also circulate items in which this  
18 dialogue goes on. You have a dialogue in which,  
19 let's say, a commissioner asks the other party --  
20 the outside party -- what if this hypothetical  
21 happened. And a party responds and says, well, we  
22 would be okay with it, or we would not be okay

1 with it, or there's this issue, whatever. Some  
2 statement is made that is material in terms of  
3 what people think about. And so the question that  
4 we really need to focus on is if that response is  
5 not identified in the ex parte -- I'm consistent  
6 with my previous position. I haven't changed it,  
7 but in my dialogue I answer this hypothetical this  
8 way. That's actually very relevant. And that's  
9 the kind of candor, I think, you want in these ex  
10 parte filings. And I think that's the challenge  
11 that we're all facing.

12 MR. KAUFMAN: Diane asked -- made a  
13 couple of points that actually were going to be a  
14 couple of our next questions. And I'd actually on  
15 one of them like to quickly go around and get a  
16 thumbs up-thumbs down on whether people think it  
17 would be a good idea.

18 Under our current system people don't  
19 even need to file a summary if they've simply  
20 reiterated what they've already said in prior  
21 written filings. One approach would be to require  
22 a filing for every ex parte meeting, but if it was



1 something where you simply reiterated what you've  
2 said before you would need to site specifically to  
3 what pleadings you addressed those points in.

4 Going around, starting -- you can start,  
5 John. Do you think that's a good idea?

6 MR. MULETA: I think that's a good  
7 practice. But I'm not sure it's material. But I  
8 think it's a good practice for everybody.

9 MR. KAUFMAN: Jef?

10 MR. PEARLMAN: Yeah, I think that should  
11 be part of the rule. For every ex parte, that you  
12 need to cite specifically where you've made  
13 arguments that you are just, you know, as Andy  
14 pointed out, consistent with prior arguments. You  
15 need to say where you said them so that would  
16 include meetings that only consisted of those.

17 MR. KAUFMAN: Andy?

18 MR. SCHWARTZMAN: Well, I do have a  
19 concern that this has to be carefully drafted so  
20 that it does not become a means of evasion by  
21 simply referring to pleadings and not elaborating  
22 where there was elaboration. Again, the

1 consistent with problem. But with that proviso, I  
2 would support it.

3 MR. KAUFMAN: David?

4 MR. SOLOMON: I'm going to add a sort of  
5 unintended consequences point that while in theory  
6 I understand the value of that, sort of it would  
  
7 have to be carefully crafted. And think back to  
8 sort of the way the rules work now. They say you  
9 have to disclose presentations and then it says  
10 but if you just summarized your comments. So,  
11 technically -- now, maybe you could define meeting  
12 in a way that's different than presentation. But  
13 people interact with the commissioners all the  
14 time, and so I think one of the things you'd have  
15 to account for is, okay, right now when Andy's on  
16 a panel with a bureau chief and Andy says I really  
17 think we need to, you know, cut back on broadcast  
18 cross ownership. Andy doesn't file an ex parte  
19 presentation because everybody knows that's Media  
20 Access Project's position. But technically that's  
21 a presentation. And do you want that to have to  
22 be filed or you're at sort of all sorts of context

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1 of, you know, people -- commissioners grab people  
2 at cocktail parties and the like and have brief  
3 discussions, and typically you're just saying what  
4 you've said for, you know, a million times and  
5 everyone knows your comment. Every time you talk  
6 to a commissioner, are you going to be filing an  
7 ex parte summary? And therefore, you either get  
8 into more enforcement sort of actions, you know, I  
9 saw Commissioner So- and-so talking briefly with  
10 this person and I didn't see any ex parte  
11 presentation in any docket and I heard them, you  
12 know, say the following word, that's one  
13 proceeding.

14           So I think you'd have to think about it.  
15 Maybe if it's a visit in the office or it's a  
16 meeting or somehow defined so that you're not --  
17 there's also kind of a fleeting exception, I  
18 think, in the rules, too, but that you're not  
19 getting in a situation where sort of you make the  
20 rules unmanageable. I think part of what the  
21 Commission tried to do in adopting them, and OGC  
22 when it was working on them, was have rules that

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1 would work most of the time. But at the same time  
2 wouldn't sort of paralyze people to figuring out  
3 that, you know, every time they open their mouths  
4 they had to do something.

5 MR. KAUFMAN: Chris, consistent with  
6 your caveat, do you have any --

7 MR. BJORNSON: Well, I think, first of  
8 all I think it's kind of standard practice among  
9 the bar to make a filing every time you go in for  
10 a meeting. So I think the need for it is not as  
11 great as one might think it is. That's why you  
12 have so many of these ex parte filings now. You  
13 know, I went in for a meeting with X. We  
14 discussed our pleadings and it's consistent with  
15 what we've already filed. You wouldn't have those  
16 if people weren't already following that practice.

17 MR. SCHLICK: So why do you think  
18 parties file those notices?

19 MR. BJORNSON: I think that parties want  
20 to comply with the letter, the intention, and  
21 don't want to violate the rules so they do belt  
22 and suspenders. You know, they go ahead and file,

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1       and even though they're not saying anything in the  
2       filing or are not required to by the rules, they  
3       disclose it voluntarily.

4               MR. MULETA:  It's a perception problem.  
5       You don't want to be accused of having a back room  
6       kind of meeting, so the best way to ensure as a  
7       member of the bar is to say we filed and, you  
8       know, we discussed this thing.  You know, there's  
9       sort of -- the cocktail party is a widely attended  
10      exception, right?  But I think the key here is  
11      people want to avoid and don't want to put their  
12      clients in a bad situation by saying you did a  
13      back room kind of thing.

14             I think the problem is, you know, is it  
15      relevant?  Is it material for the decision-maker?

16      If we can't parse that, then all the filings and  
17      -- I'm not sure they matter.  It's good practice.

18             MR. BJORNSEN:  Yeah.  And I think any  
19      rule change, you need to be really careful with  
20      the wording so that you didn't swallow up  
21      exceptions like I called to the Commission to say  
22      where is this -- the status exemption update.



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1       That's just a pure status update. And so I think  
2       we need to be careful. But I don't think it would  
3       change standard practice much at all.

4               MR. KAUFMAN: Any additions?

5               MS. CORNELL: Yeah, I agree with Chris.  
6       I mean, I think most people do file anyway when  
7       they go in, whether they, you know, say something  
8       different from their pleadings or not. But I also  
9       associate myself with David's comments that I  
10      think we need to be practical about this and not  
11      try and define things to a point where they're  
12      just not realistic or not practical.

13              MR. KAUFMAN: Jane?

14              MS. MAGO: I agree it's a good practice  
15      to have something in, and I think it's fundamental  
16      fairness to have people know that someone has come  
17      into the Commission. But I also agree with  
18      David's practical points.

19              MR. KAUFMAN: Amy?

20              MS. MEHLMAN: I would agree with what  
21      the last two said, as well. And I think there are  
22      some exemptions as far as the presentations. You

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1 know, presentations such as these that are spelled  
2 out in the rules already -- are certainly spelled  
3 out in the FCC guidelines that are on the website.  
4 So practical, but, you know, a decent set of  
5 disclosure. A decent filing that says what it  
6 needs to say so that, you know, John Q. Public, as  
7 I said before -- not to mention everybody else  
8 involved with the proceeding -- knows what was  
9 said generally.

10 MR. KAUFMAN: Before we move on to the  
11 next topic, I have one last question on this one  
12 which, again, I'd like to get a quick thumbs  
13 up/thumbs down from people, whether they think  
14 that staff should be giving a thumbs up/thumbs  
15 down on each ex parte that's filed so that someone  
16 -- at least one person who was at the meeting from  
17 staff either looks at it, says this is an adequate  
18 filing or at least gives -- if they don't think  
19 it's an adequate filing, gives the party a call  
20 and says you need to refile something. Good idea?  
21 Bad idea?

22 Why don't we start with you this time,

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1 Amy?

2 MS. MEHLMAN: You know, I'm concerned  
3 about burdening the FCC. I mean, especially  
4 during Sunshine times when, you know, things are  
5 moving fast and furious. You know, I'm not sure  
6 that you're going to actually have enough time to  
7 do some of these things or even have the staff  
8 have enough time to do it. I think generally when  
9 I go to meetings, we talk about the ex parte  
10 before we file it. You know, this is new  
11 information. Is it in the record? Yeah. If not,  
12 I'm going to put it in the record. That's part of  
13 my ex parte proceedings. So maybe just some  
14 discussion during the meeting or at the end of the  
15 meeting about what's going to go into the ex parte  
16 is more appropriate than sort of after the fact.

17 MS. MAGO: Again, I think it's a good  
18 practice and I think it's a best practice for  
19 someone at the meeting to take a look at that. In  
20 the time that I was in the commissioners' offices,  
21 I used to do that. If I saw a filing that came in  
22 that was inadequate, I was known to call people

1       and say you should do something better. I think  
2       that should be a general practice. I'm not sure  
3       it should be the clear -- a rule that can be --  
4       cause unintended consequences as Amy just talked  
5       about. You don't want to discourage the -- a  
6       meeting that needs to take place by having  
7       something that can just be a constraint.

8               MR. KAUFMAN: When you made those kinds  
9       of calls, how much pushback did you usually get  
10      from people?

11             MS. MAGO: Not ever. I mean, seriously.  
12      Whenever -- those who are out there know when you  
13      make the phone call and say, look, this really,  
14      you know, this isn't enough. This doesn't really  
15      reflect what went on and if you want the  
16      Commission to be able to rely on it, you're going  
17      to have to have more. And you don't get any  
18      pushback on that.

19             MS. CORNELL: I agree. I mean, the only  
20      person that can really do this is a FCC staffer  
21      who is at the meeting because they're the only  
22      ones who know if there was an important point that

1 was discussed that's not in the ex parte. They're  
2 the only people that know that.

3 MR. KAUFMAN: Chris?

4 MR. BJORNSON: I agree. It is a best  
5 practice. And also, to the extent that it needs  
6 to be in the record, there may be a divergence  
7 between what the staff member things should be in  
8 the record and what the filer and what the staff  
9 member is looking for in the ex parte. The staff  
10 member can pushback and ask that that be included.  
11 It may be that there was a question that was  
12 unanswered that didn't get answered in the ex  
13 parte and that's what the staff member is looking  
14 for, and it's appropriate for the staff member to  
15 push back on that.

16 MR. KAUFMAN: David?

17 MR. SOLOMON: I think it makes fine as a  
18 best practice. I'd be careful about making it a  
19 rule just because I think you're setting people up  
20 to fail, in particularly the commissioners and  
21 their staffs. And I just think -- I mean, they  
22 have so many meetings and you know, particularly



1 with ECFS. So every legal advisor has to go in  
2 ECFS and put in their own name for the last, you  
3 know, week and do it once a week and then print  
4 out every ex parte summary to see what's there.  
5 Because in ECFS, you only copy -- in the old days  
6 when you did the hard copies, under ECFS you just  
7 put it in ECFS. So I think it's a good practice  
8 for the staff to do it, but I'd be careful about a  
9 rule that, again, could lead to people sort of,  
10 you know, violating it when they're trying to act  
11 in good faith.

12 MR. KAUFMAN: Andy?

13 MR. SCHWARTZMAN: Well, I think it  
14 should be mandatory. I think that common practice  
15 -- certainly, ours is to send a copy of an ex  
16 parte notice by e-mail to the staff who attended,  
17 as well as file with ECFS. And that's easy enough  
18 to do.

19 And I think that very quickly having --  
20 knowing that somebody is actually going to eyeball  
21 these things will lead to much greater compliance.  
22 I mean, the reason we don't like those speed

1 cameras is because they work. And this will work.

2 MR. PEARLMAN: Yeah, I would agree with  
3 what Andy just said. Other agencies, the staff  
4 have a much higher burden in what they have to,  
5 you know, what kind of effort they have to put in  
6 to talk about ex partes. I think that this is the  
7 sort of thing where the burden of reading over an  
8 ex parte and signing off on it is much, much lower  
9 than the actual writing of it. So I'm not too  
10 worried about the unintended consequences.

11 MR. MULETA: I think I would agree with  
12 my public interest brethren here, but I would add  
13 language -- to the fact that you make it a rule, I  
14 would add relevancy and materiality. I mean, it's  
15 sort of -- if it's material and it was relevant,  
16 you have an obligation as a staff member to do  
17 that.

18 When I was in the Wireless Bureau, and  
19 before that when I was chief of the Enforcement  
20 Division, before David upgraded it, you know, we  
21 had to look in the record and we had to make sure  
22 everything that we relied on in the record was

1       documented. And that's when you'd make a call and  
2       you'd say, hey, you know, you told me this, but  
3       you didn't have it. And so on and so forth. So I  
4       would put in material and relevant.

5               MR. SCHLICK: John, I'm thinking of a  
6       rule-making proceeding. Let's say one that  
7       continues over a number of months --

8               SPEAKER: Years.

9               MR. SCHLICK: -- or years. The end  
10      game, you know, the Sunshine Period, the month  
11      before the Sunshine Period, relevance may be  
12      relatively easy to determine, particularly if  
13      you're talking about the bureau staff who are  
14      directly involved in the drafting or a  
15      commissioner who is considering how to vote. But  
16      at the earlier stages, at the issue framing  
17      stages, how do you decide relevance? Do you  
18      envision a system which is something like what we  
19      have now for some intergovernmental communications  
20      where you would go back and put the information in  
21      the record if you later determined it to be  
22      relevant and you didn't see at the beginning? How

1 do you handle that time problem?

2 MR. MULETA: I mean, I think there's a  
3 whole host of things that need to be done, which  
4 is -- I think it all starts out with that timeline  
5 issue that I mention. But I think to the extent  
6 that your views evolve, or the staff's views  
7 evolve, or that commissioners come in and sort of  
8 ask questions that hadn't been sort of properly  
9 framed, I think that's absolutely the exact  
10 dialogue that Commission staff ought to be having  
11 with outside parties.

12 Now, once you start having a dialogue  
13 with, let's say, one party, the ex parte rules  
14 kick in. Right? You've got to let other people  
15 know so that they can inform and add to that  
16 information. So, I mean, I think it would be  
17 great to have, you know, within the sort of  
18 governmental deliberation, put in an exception for  
19 like here's what we think the record reflects.  
20 Right? Some interim summary of what the record  
21 reflects. And I think that gives you a  
22 perspective on where people are heading. And, you

1 know, people can come in and say, no, no, I think,  
2 you know, you've found some information to be  
3 wrong. So I think it's absolutely the right  
4 approach. That's exactly the right dialogue we  
5 need to have.

6 MR. PEARLMAN: I was going to say, I  
7 think, you know, for those of you who are lawyers  
8 you know that the relevance standard in court is  
9 very broad. Anything that might make something  
10 more or less likely. And I think that's sort of  
11 the case here. And I don't think there's really  
12 actually a lot of debate about whether something  
13 is relevant. In general, it's relevant to a  
14 proceeding not if the Commission ends up relying  
15 on it, but if it's on the related topic it might  
16 in some way sway them one direction or another.  
17 And so I think keeping a broad standard is good,  
18 and I'm not really worried that someone is going  
19 to come in and try to argue that, you know, when  
20 you talked about the Jets game that was actually  
21 relevant.

22 MR. SCHLICK: So that's the current

1 standard. That's essentially the definition of a  
2 presentation where it goes to the merits.

3 MR. PEARLMAN: Exactly.

4 MR. SCHLICK: Okay. So I think that's  
5 good.

6 MR. PEARLMAN: John, is that your  
7 standard, as well?

8 MR. MULETA: Well, I just want to make  
9 sure that I was trying to address the question of  
10 when does a staff member have to go in and sort of  
11 supplement the record is when they find it  
12 relevant and material. Not whether the outside  
13 party thinks it's relevant or material.

14 MR. PEARLMAN: I would agree.

15 MR. BJORNSON: If I could add one thing  
16 that David and Andy made me think of. David  
17 mentioned that staff members now have to go in and  
18 search ECFS almost on a weekly basis to see what's  
19 filed. And Andy mentioned that his standard  
20 practice is to e-mail it to the Commission staff  
21 in the meeting. I think Andy's practice is the  
22 generally accepted practice of e-mailing it to the

1       staff members. But I quick checked the rules and  
2       with electronic filing you don't have to e-mail it  
3       to the staff member. I think perhaps a rule  
4       change would be to maintain the old method of  
5       serving or copying the Commission staff members  
6       involved in the meeting, but allow that to be done  
7       electronically through electronic mail, which all  
8       the Commission staff members' e-mails are  
9       available online.

10               MR. KAUFMAN: I think we should probably  
11       move on to the next topic which will address, I  
12       think, much more briefly than the one that we just  
13       talked about. And that is the series of  
14       exemptions that exist under the ex parte rule.  
15       And rather than going through them exemption by  
16       exemption, I think I'm just going to ask whether  
17       there are any exemptions under the current rules  
18       that you think should either be broadened or  
19       narrowed. And for now let's not talk about the  
20       Sunshine Period because we're going to have a  
21       separate section on that, but more generally. And  
22       why don't we start with you, Jane.

1 MS. MAGO: Just in terms of that, I  
2 mean, I think that the exemptions serve a purpose.  
3 The one that I do have some concern about is  
4 exemptions that go with, you know, congressional  
5 contacts. There really should be a record of the  
6 fact of the contact, if not, you know, some  
7 summary of what's in there. And if it were to be  
8 broadened -- I think that could well be broadened  
9 to state governments, which I think is an  
10 appropriate place. And there can be contacts  
11 there, as well. But there needs to be some record  
12 of that, I think, in the proceeding.

13 MS. MEHLMAN: Can I just jump in?

14 MR. SCHLICK: Absolutely.

15 MS. MEHLMAN: And maybe I'm mistaken,  
16 but my understanding is if Congress or a staffer  
17 up on the Hill, actually, contacts somebody at the  
18 FCC and the staffer at the FCC or commissioner  
19 finds it material to that particular proceeding,  
20 they have to file an ex parte. So, the question  
21 then gets to, you know, the subjective nature of  
22 that particular contact. So, you know, maybe the



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1 exemption, you know, is done away with and all of  
2 those, just as we were talking about all ex parte  
3 communications being on file, even if you're just  
4 reiterating the record, adding that particular  
5 requirement that all contacts be, you know, stated  
6 in the record.

7 MS. MAGO: I think that part of the  
8 difference is in who does it. You're right,  
9 that's the way it works. And I think the reason  
10 that there's some of the exemption that's in the  
11 rules is because there was an expectation that  
12 perhaps congressional folks would not file  
13 something in the proceeding. And I think it was  
14 largely a practical matter that the Commission  
15 said, well, under those circumstances that it  
16 ought to be the staff person who puts some sort of  
17 a notation in there that there was, in fact, the  
18 contact.

19 MR. KAUFMAN: Right. That's my  
20 understanding.

21 MR. MULETA: I think this all goes back  
22 to the Pillsbury case in which there are limits to

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1     what folks in Congress can actually do in terms of  
2     weighing in to the process. So I think the idea  
3     is to record all of this. I mean, let's be  
4     practical. A lot of the problem is not with the  
5     substance of what's being said; it is the sort of  
6     political pressure point. I mean, I'm not sure  
7     that any amount of filing will actually ever  
8     discover, you know, the atmospherics that surround  
9     those types of contacts.

10           MS. MEHLMAN: But I think from a  
11     response standpoint, if I knew that X-senator, you  
12     know, contacted the Commission and I had a  
13     contrary view in that particular proceeding, I  
14     might go to that senator and say, hey, you know,  
15     what are you thinking? Why do you say this? And  
16     give my particular, you know, side of the story.  
17     They may contact the FCC back and say, you know  
18     what? I heard the other side. Forget what I  
19     said. I mean, there's just some -- you know, I  
20     think the transparency nature of those contacts --  
21     and we can get into the Sunshine Period later --  
22     but I think we just need to be consistent with

1 Congress, public, everybody.

2 MR. KAUFMAN: Does anybody think there  
3 should be a different rule if the contact is  
4 coming from another agency in the Executive  
5 Branch? There's currently an exemption for  
6 situations where the Commission shares  
7 jurisdiction with another agency. But what if the  
8 other agency simply has a common interest, but  
9 doesn't share jurisdiction?

10 MR. SCHWARTZMAN: Well, I have a problem  
11 which I think extends beyond the scope of today's  
12 workshop, but I do want to identify it because  
13 it's a huge problem.

14 It is common practice in large  
15 transactions where, for example, there's a  
16 Hart-Scott-Rodino filing or some similar filing  
17 reposing in another agency. For Commission staff  
18 to visit the other agency, review documents, have  
19 nothing mentioned in the record that this meeting  
20 took place -- that they reviewed on these  
21 documents and relied then upon these documents --  
22 I think it's necessary for communications with

1 other agencies where there is material that is  
2 used to be identified and be made part of the  
3 record. And whether that's by altering ex parte  
4 rules or in some other way, it's a big problem.

5 MR. SCHLICK: Are you concerned that  
6 your suggestion for disclosure of those documents  
7 -- I think you're referring to the Department of  
8 Justice -- those documents have typically been  
9 provided to the Department of Justice on terms  
10 that wouldn't allow their inclusion in our record.  
11 So are you content with the idea that those  
12 conversations wouldn't occur at all? That the  
13 information gathering wouldn't occur at all if  
14 disclosure were required because of the Department  
15 of Justice's restrictions on use of its documents?

16 MR. SCHWARTZMAN: Well, it's not part of  
17 the record, so in theory it's not relied on. But,  
18 in fact, if it's reviewed, it is being relied on.  
19 And so I think some sort of disclosure or  
20 identification of documents that have been  
21 reviewed, even if they're provided on a basis that  
22 they can't be released, at least gives people

1 notice that this has taken place. And just  
2 finding out that these meetings take place is very  
3 hard and has required FOIAs and all sorts of  
4 correspondence just to find out that people went  
5 over to another agency and visited documents  
6 there.

7 MR. MULETA: I think -- I mean, in  
8 addition to what Andy said, I think the notion of  
9 the FCC being an independent agency and then  
10 having the Executive Branch sort of have  
11 undisclosed contacts, I think is problematic.  
12 And, you know, my understanding is that's not  
13 supposed to happen. But to the extent that it  
14 happens, I don't think it's -- you know, unless  
15 there's a really highly identified, you know, sort  
16 of public safety or some, you know, national  
17 defense type of situation, I'm not sure that we  
18 should make any exceptions.

19 MR. KAUFMAN: Does anybody disagree with  
20 Andy or John?

21 MS. MAGO: I have some concern about  
22 making sure that there continues to be the ability

1 of the Commission to collaborate with other  
2 government agencies. I think there are times when  
3 you have shared jurisdiction. I think -- I do  
4 make a distinction between the context of shared  
5 jurisdiction versus someone who just sort of have  
6 an interest and wants to come in and maybe attempt  
7 to influence the proceeding.

8 In a situation where there is shared  
9 jurisdiction, you need to have some ability to  
10 have some conversations that aren't necessarily a  
11 part of the record. This, in some ways, is akin  
12 to the litigation exception. You have to have  
13 some ability to understand where the Justice  
14 Department or the Federal Trade Commission may be  
15 thinking about an issue in order to fully  
16 understand the full context of how the Commission  
17 -- and you're not going to get that information if  
18 it's required to be revealed.

19 Now, I don't disagree with all of what  
20 Andy said in the sense that I think if the  
21 Commission -- and this is the way I understand the  
22 way that it works -- if the Commission has gone



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1 over to look at documents that may not be, you  
2 know, that they can't -- that they cannot say we  
3 rely on these because they're at the Justice  
4 Department. They've been held back for some  
5 reason or another. If the Commission thinks that  
6 it should rely on those, the context is that they  
7 should then ask for those documents. And it's  
8 perfectly appropriate for them to do that. And if  
9 it is that they're going to rely on them, that's  
10 the way that that should be handled.

11 I'm not sure how much you get out of  
12 knowing that people at the Commission talk to  
13 people at the Justice Department. We all know  
14 that people at the Commission talk to people at  
15 the Justice Department.

16 MR. MULETA: I think the biggest concern  
17 is actually related to the ex parte. I mean, I  
18 100 percent agree on the shared jurisdiction, but  
19 when there is not -- you know, there's an interest  
20 as opposed to a shared jurisdiction, the problem  
21 is it goes to the ex parte -- the disclosure --  
22 the fairness of it all. You know, if somebody

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1 goes in to another agency, sort of lobbies them to  
2 take a position and then those folks come in and  
3 weigh in and there's not this record and  
4 communication is not clear, you know, you just  
5 found an end run around what the Commission is  
6 trying to do by being transparent. So I think  
7 that's a big concern.

8 MR. KAUFMAN: Any last thoughts before  
9 we move on to Sunshine?

10 MR. PEARLMAN: I don't know if this  
11 would be an appropriate place to talk about the  
12 sort of retaliation problem because there is an  
13 exception for that in the ex parte rules -- an  
14 exception for when the Commission -- I forget the  
15 exact wording -- but when the Commission has  
16 promised confidentiality because of fear of  
17 reprisal. But I can tell you from a practical  
18 standpoint that is very rarely used. And most  
19 parties who are in this situation don't know about  
20 it and wouldn't know how to go about using it. So  
21 perhaps that exception should be expanded or it  
22 should be made more explicit what the procedure is

1       for getting confidentiality. Because in a lot of  
2       these cases, these people are unwilling to even  
3       publicly admit that they've talked to the  
4       Commission because that is enough, you know, and  
5       even if this were fully confidential there will be  
6       some difficulty in going to the Commission because  
7       people talk. People eventually find out who you  
8       talked to. But I think that that needs to be  
9       expanded in some way.

10               And perhaps there needs to be the stick  
11       again that says that if there is reprisal the  
12       Commission will do something about it. But to  
13       encourage those people, because I think important  
14       things -- certainly in several proceedings I've  
15       worked on -- important things have been left out  
16       of the record because there is no way to convince  
17       the suffering parties to go in and talk to the  
18       Commission.

19               MR. KAUFMAN: But I guess the question  
20       that comes up when you were to use that exemption  
21       is how then can the Commission rely on something  
22       that isn't part of the public record and that no

1       one else can reply to?

2               MR. PEARLMAN: That is absolutely a  
3       difficulty. The Commission does do it in terms of  
4       getting proprietary data from many, you know,  
5       organizations and corporations. It's a difficult  
6       problem because that also presents the same  
7       problem. It's the same problem on both sides of  
8       the issue.

9               MR. KAUFMAN: Right there we typically  
10      though would, let's say, allow outside counsel to  
11      see the information under a protective order.  
12      Could you envision something similar here?

13              MR. PEARLMAN: Yes, absolutely. I think  
14      there need to be similar checks in place because  
15      otherwise there's always the potential for abuse.  
16      So checks like that would definitely be a good  
17      thing to have. I think the problem is solvable.  
18      So perhaps just expanding the rule alone is not  
19      enough, but expanding that whole area of exception  
20      with appropriate checks in place I think would be  
21      a very positive thing.

22              MR. SCHLICK: In our earlier discussion

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1       there seemed to be healthy interest in the  
2       Sunshine Prohibition. Just for a common  
3       understanding, one week before the monthly  
4       Commission meetings, the Commission will publish  
5       an agenda of the items to be considered at that  
6       meeting. From the time of publication of the  
7       Sunshine Notice through the release of the item  
8       with a couple of exceptions pertaining to the  
9       period after adoption and before release, ex parte  
10      contacts are prohibited unless they are solicited  
11      by the Commission and the information that is  
12      produced from that contact is put on the record.

13                 David has identified this is the biggest  
14      problem. A number of you folks donned it in your  
15      one minute on important issues. But Amy, you said  
16      something that resonated with me that the rule has  
17      to balance an interest in giving the Commission  
18      time to reflect, which I think is both a practical  
19      decision-making imperative, but also relates to  
20      the Administrative Procedure Act requirement of  
21      having a record to which we respond. And the  
22      State Farm case that we have to respond adequately



1 to the issues raised in the record. And if the  
2 record is moving, that's very difficult to do.  
3 But you also said that the process needs to be  
4 fair. And I wonder if you would mind starting us  
5 off.

6 MS. MEHLMAN: Well, I mean, there's a  
7 lot of fairness issues in it. And always -- as  
8 David mentioned earlier, there's always somebody  
9 that's going to be last and somebody's not going  
10 to be able to respond to that. There's always  
11 going to be that situation.

12 But I think that there are instances  
13 where you're talking about the exceptions again --  
14 Congress can, you know, talk to the FCC; it can  
15 call the commissioners no problem. Well, you  
16 know, my strategy then would be, okay, I'm going  
17 to go to Congress. I'm going to get Congress to  
18 go to the FCC and figure out how to make this work  
19 in order to get my position, you know, listened  
20 to. I think that's a little bit of a roundabout  
21 and nontransparent way of going about things.

22 So, and again, getting to some of the

1 public interest sides over here, I think for the  
2 general public, they can't do that. They don't  
3 have the access. They're not here. So I think  
4 that we need to think very heavily about whether  
5 we keep a time -- and maybe it's not a week.  
6 Maybe it's a couple days. You know, maybe we  
7 change the timeframe of how long, you know, this  
8 is and give people a little bit more time to  
9 respond.

10 I'm a little concerned about having no  
11 contact at all because such critical decisions are  
12 made and people focus -- as John was saying  
13 earlier -- there are so many issues that are  
14 happening at the FCC and people really focus in  
15 the last week on that particular issue that's on  
16 the agenda, you know, heavily at that time. So,  
17 that's when questions come up. People want to  
18 reach out. So I would just as soon get rid of the  
19 Sunshine Period altogether and have at least an  
20 additional dialogue. And frankly, if  
21 commissioners don't want to meet, they don't have  
22 to meet. They don't have to accept your meetings.

1       So that's how I would do it personally.

2               MR. SCHLICK:  Maybe we should go around.  
3       Let's start with the question of eliminate  
4       entirely or not and take off from there.

5               MS. MAGO:  I have some hesitation about  
6       eliminating entirely the Sunshine Period.  I think  
7       it does have a purpose to give the commissioners  
8       time to reflect.  But I think it's important to  
9       recognize that the Sunshine Period and the ex  
10      parte rules kind of have different purposes.  The  
11      Sunshine Period has the purpose of repose.  The ex  
12      parte rules are intended to provide transparency  
13      in the process.  I think you can meld the two.  If  
14      what you have is that there really does need to be  
15      a record during -- of anything, any contacts that  
16      are made during that period.  Whether it's the  
17      commissioner calling out or Congress calling in,  
18      just a simple record of that.  You know, it would  
19      be -- that would keep the transparency, but you  
20      would also have that opportunity for the  
21      commissioner to say, okay, this is the time  
22      period.

1           What it really does is it gives them a  
2       time period to say I don't want to take a meeting  
3       without it becoming a cause celeb, which it does  
4       if you don't.

5           MS. CORNELL: I actually really think,  
6       as I said earlier, I think it's important to keep  
7       the Sunshine Period. I think it's really  
8       essential to sort of a thoughtful and frankly fair  
9       decision-making process for the Commission staff,  
10      including the commissioners, to have time to  
11      actually think about the arguments that have been  
12      made. And I think that this is a practice that  
13      sort of evolved over, you know, the last decade or  
14      so of more abuse than following the rules. And I  
15      think it's a simple matter of fixing it. I think  
16      you probably as a practical matter need an  
17      exception for members of Congress. It's just, you  
18      know, real world.

19           But I think it's a good idea to keep the  
20      Sunshine Period and to make it much more real than  
21      it is today. And I think that's sort of taking  
22      things back to the way, you know, people used to

1 take it a lot more seriously than they do today.

2 And I think that would be a good idea.

3 MR. SCHLICK: So are you suggestions no  
4 rules change, but a --

5 MS. CORNELL: Correct.

6 MR. SCHLICK: -- stricter adherence?

7 MS. CORNELL: It's stricter. Exactly.

8 I mean, I think the rules are what they are. It  
9 might be that on rare -- very rare occasions, that  
10 the staff really does need to ask, you know, have  
11 some kind of, you know, ask for information. But  
12 basically what we're talking about here is moving  
13 the deadline. You know, the deadline is either  
14 the day of the vote or the deadline is a week  
15 before at Sunshine. It's a deadline. And I  
16 think, you know, this probably should be coupled  
17 with some kind of advance notice that something is  
18 going to be on Sunshine so people don't get, you  
19 know, sort of chopped off. But I think that, you  
20 know, if there's going to be a deadline, you might  
21 as well have it a week ahead of time so people can  
22 actually think about what's in the record and

1 think about the arguments that have been made.

2 That's my view.

3 MR. SCHLICK: If one of the problems is  
4 that the decision-makers don't really want repose,  
5 why should the rules attempt to force them there?

6 MS. CORNELL: You know, obviously the  
7 Commission can do whatever they want in terms, you  
8 know, it's a Commission decision. But I think it  
9 really is something that promotes fairness to the  
10 parties involved and promotes a more thoughtful  
11 decision-making process. And I think it's, you  
12 know, it's something that you need to get  
13 consensus on. But, you know, it's a  
14 Commission-level decision, of course.

15 MR. BJORNSON: I think one issue in  
16 terms of the Sunshine Period and discussion that's  
17 been addressed, you've got open letters that might  
18 be put in newspapers, ads taken out in Comm Daily,  
19 and now you've got the FCC's blog and efforts to  
20 go into new media. I think what's on the record  
21 needs to be defined. And you can still  
22 participate in the public debate outside of the

1 record. And it could well be that the FCC's blog  
2 is not considered part of the record even though  
3 probably you should have some way to add whatever  
4 you're posting into the record. And so, yeah, you  
5 would still have this kind of outside public  
6 debate, but the official record would be closed  
7 off at a certain time. And I think there are ways  
8 that you could combine the blog into ECFS. And  
9 that might be an ECFS 2.1 fix where if you want a  
10 blog post then to become part of the record,  
11 you've got some sort of connection that you hit a  
12 button and then you fill out greater detail in  
13 terms of form and you can add it to the record if  
14 it's still within the Sunshine Period. But  
15 otherwise you might be outside.

16 MR. SCHLICK: Is there a material  
17 difference in -- let's start with the perspective  
18 of commissioners and commission staff -- between  
19 an electronic submission and a phone call or a  
20 personal visit? Should we be attempting to  
21 distinguish from those? I guess why don't I frame  
22 the question more broadly. Is there a practical

1 difference in terms of repose and the objectives  
2 to the rule? And also, is there a difference to  
3 the interested community -- the most obvious being  
4 that something following the ECFS or on the blog  
5 is immediately available to all those who have  
6 access to the Internet? And that frames a third  
7 issue which is is that fair to those who don't  
8 have access to electronic filing -- at least don't  
9 have ready access, don't have a computer at their  
10 office or work?

11 MR. BJORNSON: Well, I think you could  
12 shut ECFS submissions down with the Sunshine  
13 Period and so that anything that's received after  
14 the Sunshine Period you could keep from being  
15 posted or part of that record.

16 In terms of e-mailing a commissioner, if  
17 you do that then that is a direct contact by any  
18 definition. But a blog posting, whether it be the  
19 FCC's blog or your own personal blog, a letter to  
20 the editor or an editorial in a newspaper like The  
21 Wall Street Journal or The Washington Post, I  
22 think those do go outside the bounds of direct



1       communications and go outside the record. They're  
2       part of a public debate that's not the FCC record.  
3       I think there needs to be a line drawn between  
4       those two.

5               MR. KAUFMAN: I think one of the  
6       questions that Austin was asking is whether maybe  
7       we should have a more relaxed standard for  
8       electronic filings both because they impose less  
9       of a burden arguably on Commission staff than  
10      taking a half hour or 45 minutes out of your day  
11      for a meeting. And also because the parties could  
12      see them immediately and if they wanted to reply  
13      could reply.

14             MR. BJORNSON: So keeping the electronic  
15      record open longer than the oral record?

16             MR. SOLOMON: I would go back to one  
17      thing Austin said. I mean, I think all of these  
18      ideas are sort of very constructive if you start  
19      from the premise that the Commission wants a  
20      period of repose. And I think that's sort of --  
21      here is the question, too. I mean, a lot of what  
22      goes on that creates issues for, you know, during

1 the Sunshine Period is, you know, commissioners  
2 call up people and say, you know, on Wednesday,  
3 here's where it's heading. I want to ask you what  
4 you think. And you know, if they want that then  
5 it creates problems. You know, you mentioned,  
6 well, then people can request to have the  
7 commissioners ask and it sort of gets to become a  
8 sliding scale.

9           So I mean, the core thing it seems to me  
10 is what does the Commission want? I think the  
11 premise was 20 years ago it was sort of helpful to  
12 rational decision-making to just say at some point  
13 it all stops and sort of everyone is thinking  
14 internally and discussing things internally. And  
15 the real question to me is do the commissioners  
16 want that? And if the commissioners want it, then  
17 I think, you know, the rules work pretty well and  
18 you can have various sort of, you know, tweaks to  
19 the rules and maybe focus just on, you know,  
20 prohibiting oral and not written.

21           But to me the fundamental question is  
22 what does the Commission want? Because I think

1 with the Sunshine Period it's always been tension  
2 between sort of OGC has a concept of what the  
3 record should look like and so there are rules to  
4 sort of help with that, but it's not how the  
5 commissioners want to act necessarily.

6 MR. SCHWARTZMAN: I believe that the  
7 problem of this soliciting communications during  
8 the Sunshine Period is huge and is one of the very  
9 biggest problems the Commission faces in  
10 transparency. Therefore, I think you have to  
11 either raise the bridge or lower the river.  
12 Either you bar all oral communications during the  
13 Sunshine Period, or if you permit then, you have  
14 to permit them all.

15 SPEAKER: With disclosure?

16 MR. SCHWARTZMAN: With disclosure.

17 MR. PEARLMAN: Yeah, and I think what  
18 the Commission actually wants can inform your  
19 decision of which of those to do. But also in  
20 terms of your question about -- your question  
21 about whether you should extend, you know, ignore  
22 the Sunshine Period for electronic while not for

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1 others, part of the problem with the current  
2 Sunshine Period setup is that, you know, there  
3 will always be disparities in how much access  
4 different parties have. But the way the current  
5 Sunshine Period is set up, it amplifies those  
6 disparities.

7 People, you know, people with access can  
8 go through Congress. People with access can  
9 solicit invitations. And I think the sort of  
10 thing where you limit it to electronic filings is  
11 another way that it would amplify those  
12 disparities. That's what we want to avoid. So  
13 that would return to Andy's point, which is, you  
14 know, raise the bridge or lower the river. So we  
15 can make that decision based on what the  
16 Commission wants. But one or the other should  
17 happen.

18 MR. MULETA: I think you should get rid  
19 of it. The main reason being that, you know, for  
20 all the complexity and it makes things unfair.  
21 So, I don't know if you all remember, but after  
22 9-11 -- no, after the anthrax scare actually, you

1 know, getting mail into the Commission became a  
2 really difficult issue. So what about that, you  
3 know, ordinary person who just wants to write a  
4 letter and get the commissioners to hear him, you  
5 know, from the home town or something like that  
6 who might or might not have access or might not be  
7 aware of ECFS. So I think, you know, getting  
8 actual communications to the Commission should be  
9 open to all formats, as many formats as possible.  
10 The commissioners are going to decide the  
11 relevancy. It's not really up to the other folks.

12 The second issue is it's an arbitrary  
13 deadline. Right? The Commission decides that  
14 it's going to put a bunch of items on the meeting  
15 agenda, and sometimes it takes them off; sometimes  
16 it puts them on -- puts additional things on. The  
17 date is essentially unknown for the most part  
18 until it's announced. So I think it's an  
19 arbitrary artifact and I think it really came out  
20 of -- this concept of repose came out of the old  
21 days when we didn't have computers and word  
22 processors and things like that. And people had

1 to scramble to put that record in place. You  
2 know, it took an enormous amount of effort  
3 internally to do that. I don't think we have as  
4 much of a problem today, so I think the best thing  
5 to do is get rid of the Sunshine, let people  
6 decide whether they want to have meetings or not,  
7 and sort of suffer the consequences one way or the  
8 other.

9 MR. PEARLMAN: Yeah, one minor point I  
10 just wanted to add. If the purpose is truly  
11 repose, then leaving the electronic record open  
12 kind of eliminates that purpose. If something is  
13 submitted electronically which is relevant, then  
14 the Commission needs to read it and they don't get  
15 repose. And if it's not relevant then why did we  
16 allow it to be submitted in the first place?

17 MR. SOLOMON: As Amy said, if the  
18 commissioners want repose they can say no to a  
19 meeting anytime they want. It may be the  
20 difficult politically, but they can do it.

21 MS. MAGO: It is difficult politically.  
22 But I think the fundamental key here is the

1 fairness element. We've kind of gone off on, like  
2 up and down on different topics in this, but in  
3 terms of -- whatever access there is during that  
4 period, I think it needs to be across the board  
5 that, you know, anyone can get it. There's a  
6 fundamental fairness that has to go with this.  
7 The blogger exception bothers me in the sense that  
8 it does sort of create some disparity.

9 MR. SCHLICK: To that end, another  
10 little piece. I've heard a lot of disagreement,  
11 but I think earlier I heard directly and  
12 thematically I believe we may have consensus on  
13 this point. That to the extent that contacts  
14 occur during the Sunshine Period, they need to be  
15 promptly and pervasively reported. Maybe we can  
16 just go around with a yes-no, maybe starting with  
17 Amy, should there be a rule for reporting ex parte  
18 contacts during the Sunshine Period that requires  
19 electronic submission of the ex parte notice and  
20 sets a very short deadline for doing that?

21 MS. MEHLMAN: Yes.

22 MS. MAGO: Yes.



1 MS. CORNELL: Yes.

2 MR. BJORNSON: Mandatory electronic  
3 filing, yes.

4 MR. SOLOMON: Yes.

5 MR. SCHWARTZMAN: Yes.

6 MR. PEARLMAN: Yes.

7 MR. SCHLICK: Is there a but?

8 MR. PEARLMAN: Someone earlier proposed  
9 the idea of during the Sunshine Period, even if  
10 Commission don't (sic) normally file, that that  
11 would be an appropriate time for them to get  
12 involved. I like that idea.

13 MR. MULETA: I think yes, with the  
14 Commission taking on the responsibility, for  
15 example, for pro se folks in letting them know we  
16 will file it. Send us the letter. Fax it to us.

17 MR. SCHLICK: Some mechanism.

18 MR. MULETA: Some mechanism.

19 MR. BJORNSON: I think the Reference  
20 Center is probably set up to allow people to use a  
21 computer to do something like that. Or should be.

22 MR. MULETA: I think setting up a

1 mechanism so that people can actually transmit it  
2 and make sure that it's actually entered into the  
3 record.

4 SPEAKER: That's key.

5 MR. MULETA: All of this is driven, so  
6 one of the things you have with paper filings is  
7 it's really not an issue of it not being delivered  
8 to the Commission. It just takes --

9 SPEAKER: Three or four days.

10 MR. MULETA: -- three or four days. And  
11 having run an informal complaints group within the  
12 Commission, I know people send it to you on  
13 napkins and stuff like that.

14 But I think if the staff is relying on  
15 the information, they should also sort of relay  
16 and say, hey, I know it might be difficult to get  
17 the information. Do you need any help? That  
18 would go a long way.

19 MS. MEHLMAN: Absolutely. Like, the --  
20 I notice in the Daily Digest you see the list of  
21 ex parte filings. And it would be nice to have a  
22 quick link to it or something. I know that even

1       when I say that I go to the record and it's not  
2       necessarily in there yet. So, maybe it's through  
3       ECFS, you know, 2.0 or whatever it is that the  
4       actual form you submit -- instead of the  
5       traditional normal paper filings, you submit the  
6       actual ex parte in the little box that they give  
7       you. And that is actually immediately available.

8               MS. CORNELL: I think the key theme that  
9       I'm hearing, and I certainly feel, is that whether  
10      you keep the Sunshine Period or get rid of the  
11      Sunshine Period, that you make access available in  
12      a nondiscriminatory manner as much as you possibly  
13      can. And access to information, like ex partes,  
14      and access by whatever means you're trying to  
15      communicate with the Commission, whether it's  
16      blogs or written meetings or written filings or,  
17      you know, oral meetings. I think that's the key  
18      point.

19             MR. MULETA: I think one maybe practical  
20      suggestion would be that you sort of self-select  
21      people that want to do everything electronically.  
22      So, if Chris wants to do -- says, look, I'm going

1 to be an electronic filer, sort of like the FCC,  
2 you know, I'm going to file under EDGAR as an  
3 electronic filer. Then, you know, you sort of  
4 have that obligation. If you're not, then you  
5 have other mechanisms to provide it. And that the  
6 Commission is aware that you, as a filer, don't  
7 fall into that group.

8 MS. RICHARDS: Okay. We're going to  
9 change course a little bit.

10 MS. MAGO: I apologize. I have to go  
11 upstairs. Thank you.

12 SPEAKER: Are you going to file that?

13 MS. MAGO: I'll file an ex parte. I  
14 promise.

15 MS. RICHARDS: Right.

16 MR. SCHLICK: Thank you, Jane.

17 MS. RICHARDS: So some have asked  
18 whether there should be a rule that discloses the  
19 kind of real party in interest or discloses people  
20 who have made monetary contributions towards the  
21 preparation of the brief or presentation or  
22 comment. Whether kind of who is the parent

1 company. At the Federal Trade Commission there  
2 was -- you would need to report an advertising  
3 disclosure of material connections. Do you think  
4 that that is a problem or something that we need  
5 to look at at all? Andy?

6 MR. SCHWARTZMAN: I think it's an  
7 occasional problem, and I think it would be  
8 salutary to require some sort of disclosure of  
9 that kind; however, it does get tricky. I'm  
10 disappointed Jane had to leave because this is a  
11 trade association problem, as well as a problem  
12 for us. We often come into the Commission, as I  
13 am here today, speaking generically on behalf of a  
14 constituency, but not representing anyone in  
15 particular. And identifying a real party in  
16 interest in that kind of situation or identifying  
17 real party in interest for a trade association  
18 could get very difficult and cause problems. But  
19 the simpler case --

20 MS. RICHARDS: And in the court rules  
21 that's recognized --

22 MR. SCHWARTZMAN: Right. Right.

1 MS. RICHARDS: -- and the associations  
2 do not.

3 MR. SCHWARTZMAN: So that has to be  
4 teased out. But there have been occasional  
5 abuses. And certainly, the principal -- if  
6 somebody is being paid to make a representation on  
7 behalf of somebody, that real party should be  
8 identified.

9 MR. MULETA: I'm not sure that it's a  
10 big issue in the sense that if we're talking about  
11 permit but disclose proceedings or rule-making  
12 types of proceedings where, you know, anybody --  
13 there's not the standing issue. Right? So in the  
14 courts, you know, you want to make sure that there  
15 is standing, but I'm not sure in these kind of  
16 proceedings it matters as much as the fact that a  
17 certain position has been filed and taken and  
18 disclosed. So if the other parts of the ex parte  
19 rules are working, I'm not sure that this is  
20 necessary.

21 MR. PEARLMAN: I'd just add to that, I  
22 mean, I agree with both those statements. It is

1 something that should be -- I agree with Andy that  
2 it's something that should be added, but in  
3 practice it has not been a huge problem except  
4 that I think the place where it is a problem is  
5 John Q. Public because while I may know that this  
6 person is really representing this organization,  
7 random people in the public may not know that.  
8 And that's something that -- that's information  
9 that they should have access to.

10 MS. RICHARDS: Okay.

11 MR. SCHLICK: Joel?

12 MS. RICHARDS: Did you want to do the  
13 new media?

14 MR. KAUFMAN: Yeah, sure. On new media,  
15 since we just have a couple of minutes, in a  
16 couple of recent dockets we've tried to experiment  
17 with including in the record things like blogs and  
18 I just want to get people's reactions to what they  
19 see as the benefits and the pitfalls of doing  
20 that. And just to give one example, that we were  
21 recently criticized by one party for giving blogs  
22 access, as Austin mentioned during the Sunshine

1       Period, when not everyone had immediate access to  
2       the Internet. There are also questions of how to  
3       deal with filings on a blog that may be anonymous  
4       and, you know, just whatever thoughts people might  
5       have on the new media issue.

6               Why don't you start off, Jef, given that  
7       your organization deals a lot with electronic  
8       government-type issues.

9               MR. PEARLMAN: Absolutely. And I will  
10       say that this is something we're still discussing  
11       internally and it's a very complex problem. But I  
12       think Chris hit on a really good point, which is I  
13       think the Commission needs to consider very  
14       carefully what things it does that should be part  
15       of the record or should be part of the record  
16       automatically and should not. So the Commission's  
17       function does not only include, you know, record  
18       making. The Commission includes functions of, you  
19       know, promoting dialogue, promoting conversation.  
20       And the blog serves that function in a very real  
21       way. So that doesn't necessarily mean that  
22       everything that happens on the blog should be part



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1 of the record.

2 And, you know, if the Commission decided  
3 to take that approach, you could leave the blog  
4 open indefinitely with the understanding that if  
5 you want something you say in there to be part of  
6 the record, either through an automated system  
7 like Chris suggested, or through a manual system  
8 where you have to go over to ECFS and type in, you  
9 know, copy and paste your post if you want it to  
10 be a comment in the record. Whereas, under normal  
11 circumstances your blog post is a communication,  
12 kind of like your letter to the editor of The Wall  
13 Street Journal, but it's not in the record.

14 But I think this is a very quickly  
15 evolving question. And the Commission needs to  
16 consider these things on a case-by-case basis and  
17 look at these new technologies -- these new forms  
18 of communication as they happen, as the Commission  
19 offers them -- and decide whether they are really  
20 -- what function they are serving.

21 MR. SCHLICK: Does that create a problem  
22 of the Commission then selectively culling through

1 the off record comments and including into the  
2 record those which it agrees, those which support  
3 the conclusion, but not the others?

4 MR. PEARLMAN: I mean, the way I was  
5 envisioning this, the blog posts are not part of  
6 the record any more than a, you know, letter to  
7 the editor of The Wall Street Journal, a post on  
8 my own personal blog, my own web page, you know,  
9 the home page of an interested party. They're not  
10 part of the record and the Commission can include  
11 them in any way that they normally could. So  
12 someone could file that thing and make it a part  
13 of the record, but the Commission can't rely on  
14 something that is purely on the blog and has never  
15 been submitted in another fashion to the record.

16 MR. MULETA: There's already -- the  
17 Commission makes exceptions prior to this blog  
18 thing about informal comments, right? You know,  
19 sort of people that go to the Proceeding page and  
20 type in a brief comment, I support X, Y, Z. And  
21 I'm, you know, a bit chagrined that, you know,  
22 this sort of has blown up because that's been

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1       around for a while which is -- I mean, the issue  
2       here is how does the Commission treat these  
3       informal comments is, I think, the core issue as  
4       opposed to whether it's a blog, or it's an e-mail,  
5       or, you know, some other format.

6               I think, you know, I just would caution  
7       the Commission not to give preference to one  
8       communications medium by granting a waiver in a  
9       particular proceeding or whatever. I think it's  
10      either all or nothing in terms of communications  
11      media because, you know, no matter what we do, you  
12      know, there's still 5 percent of the population  
13      that doesn't have phones, you know. So, that's  
14      the kind of thing we have to deal with.

15             MS. MEHLMAN: The one thing I would say  
16      though is you have to start somewhere. And  
17      absolutely, the FCC is working extraordinarily  
18      hard, as are a lot of companies out there to get  
19      the -- to get broadband to everybody. And to not  
20      rely on some of those communications -- in some  
21      organized fashion, I would add -- you know, be it  
22      dropdown menus, in a blog fashion, you're actually

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1 discussing these issues in, you know, FCC Docket  
2 96, 86, or whatever. There's practical ways to do  
3 it electronically.

4 But I wouldn't -- I don't want to  
5 exclude those people that have access to, you  
6 know, to actually be part of the dialogue.

7 MR. MULETA: Well, I think the issue  
8 here is -- I want to point out one thing. Please,  
9 please, don't do anonymous postings.

10 MS. MEHLMAN: I agree.

11 MR. MULETA: I think that's absolutely a  
12 terrible idea. I mean, you know, you can have --  
13 people can do anonymous postings, but people  
14 should tell you who they are, what -- you know,  
15 what their personal, you know, where they are so  
16 you can actually track them down to the extent  
17 that you rely on the information. You're able to  
18 identify and figure out where Jef is and ask him a  
19 question.

20 MS. MEHLMAN: I agree with that.

21 MR. MULETA: I'm not trying to say  
22 exclude blogs. I think what we need is clarity on

1       how you treat the sort of informal comments that  
2       come in that don't sort of have the normal, you  
3       know, lawyer headings and all that kind of stuff.

4               MR. BJORNSON:  And I think to include it  
5       in the record, as Jef and I have been discussing,  
6       the blog posting that the poster wants to include  
7       in the record kind of has to deal with blog plus.  
8       You'd hit a button, say, on the blog and it would  
9       pull up ECFS so that the required fields in ECFS  
10      in order to put something in the record.  So that  
11      there's a distinction between putting something on  
12      the record and expressing your ideas where one is  
13      just an outlet of your First Amendment rights and  
14      your expression, whereas the other is you want  
15      this considered by the Commission and you have  
16      your name attached to it and your party.  And so I  
17      think having something to push it into the record  
18      allows for the expression outlet and then also  
19      allows you to put the proper formality into it.

20             MR. SOLOMON:  The tension -- and I don't  
21      know the answer -- but just the tension seems to  
22      me how the Commission and the staff is going to



1 use it. Because to the extent the Commission  
2 staff is going to say we're going to follow the  
3 blogs closely; we're going to, you know, these  
4 blogs are going to help inform our thinking on the  
5 proceeding, then it's difficult to say and we'll  
6 choose which of them we're going to put in the  
7 record. I mean, it just creates some tension. I  
8 don't know the answer, but that's the issue.

9 MR. BJORNSON: And that's the tension  
10 with old media, as well. For instance, I think  
11 most -- all the commissioners and Commission  
12 staff, if not all, get Comm Daily and so you can  
13 put the ads in Comm Daily during, say, a Sunshine  
14 Period and influence that way. I mean, there are  
15 always tensions, yeah.

16 MR. SOLOMON: The net neutrality in PRM  
17 says that that is a formal way to file comments.  
18 So, I mean, at least for that proceeding the  
19 Commission has said everything is in the record.

20 MR. BJORNSON: In which case the blog  
21 should actually have more identifiers to it.  
22 Right now you can file as a guest, you can file

1       anonymously, you can have some sort of strange  
2       screen name that would never be identified to you.

3               MR. PEARLMAN:   And I think that's why I  
4       say the Commission needs to carefully consider  
5       what the purpose of these different services it's  
6       offering is.   You know, if you want the blog to be  
7       a record-producing -- if you want it to serve a  
8       record-producing function, then you should ensure  
9       that it has the same features as the other  
10      record-producing functions, including being able  
11      to find the person that filed it and ask follow up  
12      questions.   There's definitely value to having a  
13      blog which allows anonymous postings.   Being able  
14      to get -- having people be able to communicate  
15      anonymously is a very important feature, but that  
16      may not be appropriate for inclusion in the  
17      record.   You know, in a year the answer to the  
18      question of whether the blog is appropriate for  
19      the record may change.   Maybe in a year you'll  
20      have individual message boards for each proceeding  
21      and that will be part of the record.   But the blog  
22      will be a purely informal discussion point.

1           So I don't actually have a conclusion as  
2   to how the blog should be applied now or in a  
3   year, but I think it's very important that the  
4   things that go into the record have the features  
5   you've decided are important to the record and not  
6   be treated differently from other forms of media  
7   and sort of, you know, amplify the digital divide  
8   that it's part of the Commission's mission to  
9   close.

10           MR. SCHLICK: I think I'm going to cut  
11   off the discussion there. It's noon now and with  
12   your indulgence I may take maybe four more  
13   minutes.

14           First, we asked for questions from the  
15   audience, and there were a couple of questions for  
16   the panelists which I think we touched on and  
17   answered at least indirectly. There are also  
18   several questions for the three of us, really.  
19   And I'm just going to ask Joel very quickly to  
20   talk about those.

21           MR. KAUFMAN: One question was what was  
22   the status of the ex parte NPRM that was

1       circulated earlier this year. And my expectation  
2       is -- and obviously this will depend on  
3       discussions with the commissioners' offices --  
4       would be that based on the input that we've gotten  
5       today, that there will probably be a revised  
6       version of that NPRM. But the exact details of  
7       what changes we would be making or staff would be  
8       proposing, you know, we will need to have further  
9       discussions based on the conversations today.

10               There was a question about whether, in  
11       1995, when the Commission proposed ex parte rules  
12       that it proposed a requirement that the ex parte  
13       summary highlight "the positions taken," and then  
14       we adopted a somewhat different standard when we  
15       actually adopted the rules a couple of years  
16       later. I think as a general matter, the standard  
17       that we adopted that includes a requirement for a  
18       filing of all new facts or arguments that weren't  
19       previously in the record largely encompasses the  
20       standard of the positions taken perhaps with a bit  
21       more detail. But again, that's something that as  
22       we go back and take a look at the rules we can

1 take another look at, particularly in the context  
2 of whether or not we should be requiring a filing  
3 for all ex parte meetings rather than simply ones  
4 that had new data or arguments.

5 And then there was a question in terms  
6 of whether the Commission has taken ex parte  
7 enforcement actions and issued sanctions, and if  
8 we have done so on a public basis. And the answer  
9 is that we have done so in cases where the  
10 Commission thought the violations were especially  
11 serious.

12 And the other thing I should mention  
13 here is that aside from ex parte reform, another  
14 part of the Commission's reform agenda is to  
15 increase the number of docketed proceedings which  
16 as that happens both the pleadings and the  
17 Commission's decisions as a matter of course would  
18 be electronically available as opposed to someone  
19 now having to come and ask for them.

20 MR. SCHLICK: Thanks, Joel.

21 MS. RICHARDS: Yeah. I was just going  
22 to say ECFS now gives us the capability to handle

1 a lot more proceedings. And so where we kind of  
2 narrowly defined things as docketed proceedings,  
3 and, therefore, part of the electronic system, we  
4 are working to expand what we can include in ECFS  
5 so that more proceedings will be available  
6 electronically.

7 MR. KAUFMAN: Right. And one of the  
8 reasons for that is someone recently told me that  
9 before the anthrax events in 2001, approximately  
10 80 percent of filings came into the Commission in  
11 paper form and then actually had to be manually  
12 scanned into ECFS. Now, the vast majority come in  
13 electronically, so that, you know, makes it much  
14 less of a resource issue going forward.

15 MR. SCHLICK: I am very solicitous of  
16 John's heartburn concern and I personally can't  
17 stand leaving court wishing I had said one more  
18 thing. So, if there is anyone who would like to  
19 say something before we adjourn, this is your  
20 chance.

21 SPEAKER: This is my (inaudible) moment?

22 MR. SCHLICK: Anyone?

1           MR. MULETA: I think two issues. I  
2 think one is we have made a lot of distinction  
3 about agenda meetings, and I think we also need to  
4 look into sort of nonagenda items and sort of how  
5 the ex parte rules play with them.

6           And I think the second thing is I would  
7 ask, to the extent that you were looking at  
8 changing the ex parte rules, some of the data that  
9 you need to look at is how the Commission has  
10 handled decisions that have a very strict timeline  
11 and sort of whether that process has really  
12 facilitated a much more fulsome discussion -- 271  
13 proceedings, the transfer and control of licenses,  
14 1996 had -- the 1996 Act had a whole bunch of  
15 deadlines. Forbearance petition is another issue  
16 which might cut both ways. And then the Omnibus  
17 Broadband Initiative itself, I think, is very  
18 instructive about what people are willing to put  
19 forth into the record and the level of disclosure.  
20 So those are my two Maalox moments.

21           Thank you.

22           MR. SCHLICK: Anyone else?

1 MS. MEHLMAN: I would just say, again,  
2 accessibility, the technological advances to  
3 allow, you know, for quick turnaround of some of  
4 these filings would be very instructive. And I  
5 think instructive for the Commission staff, as  
6 well. If we're going to talk about response from  
7 them and asking for additional information in a  
8 timely fashion, that is a critical issue that  
9 needs to be addressed.

10 MS. CORNELL: I would just point out  
11 that I think sort of creating a new enforcement  
12 regime is probably going to be counterproductive.  
13 David's cottage industry piece, I think, there's  
14 just a lot of focus -- the focus would shift to  
15 process rather than the substance. And the point  
16 is for the Commission to make decisions based on  
17 the best information available. And I think  
18 that's where the focus should stay. I think  
19 Commission staff can change the practices  
20 informally, but very effectively.

21 MR. SCHLICK: I think I'll let that be  
22 -- no? This is the last word.



1           MR. BJORNSON: Just to continue to  
2       emphasize maximize the use of the electronic  
3       systems, be it in docketed proceedings,  
4       nondocketed application proceedings. If  
5       everything is coming to the Commission except for  
6       a very few -- a very, very, small amount of  
7       documents, that's the way it should be. And in  
8       fact, every document should be able to come into  
9       the Commission electronically. And there's still  
10      some holes to fill there.

11          MR. SCHLICK: Great. Thank you to the  
12      panelists. I think this was a tremendous  
13      discussion. I know it will be very helpful for  
14      me. I'm sure for Joel and Mary Beth. And I hope  
15      to those in the audience that it was interesting  
16      and informative to you, as well.

17                Thank you all very much.

18                       (Whereupon, the PROCEEDINGS were  
19                       adjourned.)

20                               \* \* \* \* \*

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